

Tax Dispute Systems Design: International
Comparisons and the Development of Guidance from
a New Zealand Perspective

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of Doctor of Philosophy in Taxation

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Note on Style

Where possible, this thesis has followed the *New Zealand Law Style Guide*.¹ This thesis differs, inter alia, with respect to the format of headings, which have been numbered rather than listed alphabetically for the purposes of clarity. In addition, for ease of reading, abbreviations have been used for some country names. *The Bluebook: A Uniform System of Citation*² and *TaxCite: A Federal Citation and Reference Manual*³ have been used for the citation of the relevant United States legislative material and Internal Revenue Service material.

Due to recognised technical constraints associated with Microsoft Word 2013, which was used to write this thesis, there are anomalies in the continuity of the footnote numbering in pages containing, and following, certain figures and tables included in this thesis. This affects the footnotes following: Figure 2.6 (pages 50-51), Figure 2.7 (pages 52-56), Table 2.1 (pages 57-71), Figure 3.1 (pages 78-97), Figure 4.3 (pages 120-138), Figure 5.3 (pages 158-178) and Table 6.1 (pages 184-210). Accordingly, there may be more than one set of footnotes occurring within certain chapters. Thus, the first time a text or article is cited in a set of footnotes, it has been cited in full, notwithstanding that it may have previously been cited in a prior set of footnotes in that same chapter.

This thesis reflects the tax dispute resolution systems in place in the selected jurisdictions under study up until 30 November 2016.

¹ Geoff McLay, Christopher Murray and Jonathan Orpin *New Zealand Law Style Guide* (2nd ed, Thomson Reuters, Wellington, 2011).

² The Columbia Law Review Association, The Harvard Law Review Association, The University of Pennsylvania Law Review and The Yale Law Journal *The Bluebook: A Uniform System of Citation* (20th ed, The Harvard Law Review Association, Cambridge, MA, 2015).

³ Virginia Tax Review Association, New York University School of Law, American Bar Association Section of Taxation *TaxCite: A Federal Citation and Reference Manual* (American Bar Association Section of Taxation, Washington DC, 1995).

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Conference Presentations and Publications Informing and Incorporated into this Dissertation

Conference Presentations Informing and Incorporated into this Dissertation

Melinda Jone “Evaluating Australia’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (paper presented at the 27th Australasian Tax Teachers Association Conference, Adelaide, 19-21 January 2015) published as “Evaluating Australia’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (see below).

Melinda Jone “Evaluating New Zealand’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (paper presented at the 28th Australasian Tax Teachers Association Conference, Sydney, 20-22 January 2016) published as “Evaluating New Zealand’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (see below).

Melinda Jone “What can the United Kingdom’s Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective” (paper presented at the 12th International Tax Administration Conference, Sydney, 31 March-1 April 2016) published as “What can the United Kingdom’s Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective” (see below).

Publications Informing and Incorporated into this Dissertation

Melinda Jone and Andrew J Maples “Mediation as an alternative option in Australia's tax disputes resolution process” (2012) 27(3) Australian Tax Forum 527.

Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand's Tax Dispute Resolution Procedures” (2012) 18 New Zealand Journal of Taxation Law and Policy 412.

Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime” (2013) 19 New Zealand Journal of Taxation Law and Policy 301.

Melinda Jone “Evaluating Australia’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (2015) 13 eJournal of Tax Research 552.

Melinda Jone “Evaluating New Zealand’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (2016) 22 New Zealand Journal of Taxation Law and Policy 228.

Melinda Jone “What can the United Kingdom’s Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective” (2017) 32(1) Australian Tax Forum 59.

Glossary of Dispute Resolution Terms

This glossary is a collection of dispute resolution terms used in this thesis. The glossary is not all-encompassing and moreover, it is not intended to be a prescriptive guide to how dispute resolution terms should be used generally. Rather, it is intended to assist in the understanding of certain dispute resolution terms used in the context of this study.¹

Adjudication is a process in which the participants present arguments and evidence to a dispute resolution practitioner (the adjudicator) who makes a determination which is enforceable by the authority of the adjudicator.

Advisory dispute resolution processes are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include case appraisal, case presentation and early neutral evaluation.

Alternative dispute resolution (ADR) is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.

Arbitration is a process in which the participants to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination. Arbitration can be binding (conventional arbitration) or non-binding (advisory arbitration).

Blended dispute resolution processes are processes in which the dispute resolution practitioner plays multiple roles. For example, in conciliation and in conferencing, the dispute resolution practitioner may facilitate discussions, as well as provide advice on the merits of the dispute.

Case appraisal is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved.

¹ This glossary is based on definitions from: National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016); Stephanie Smith and Janet Martinez “An Analytic Framework for Dispute Systems Design” (2009) 14 Harv Negot L Rev 123 at 165-169; and Ministry of Business, Innovation and Employment “Glossary” (15 September 2015) <<http://www.mbie.govt.nz/about/our-work/roles-and-responsibilities/government-centre-dispute-resolution/tools-and-resources/glossary>> (last accessed 7 November 2016). For the purposes of this study, some definitions have been modified by the researcher.

Case presentation (or mini-trial) is a process in which the participants present their evidence and arguments to a dispute resolution practitioner who provides advice on the facts of the dispute, and, in some cases, on possible and desirable outcomes and the means whereby these may be achieved.

Collaborative practice is a process in which the parties, their lawyers and any other experts involved, agree not to go to court or threaten to go to court in resolving a dispute. All involved also agree that if the process is not adhered to, the lawyers cannot represent the parties in any subsequent, related litigation. The process supports the use of interests-based negotiation between the parties.

Co-mediation is mediation conducted by two or more mediators. The respective mediators may bring different skills to the process, for example, technical or subject matter expertise, or dispute resolution expertise.

Conciliation is a process in which the participants, with the assistance of the dispute resolution practitioner (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

Conference/Conferencing is a general term, which refers to meetings in which the participants and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.

Coaching is a set of skills and strategies used to support peoples' abilities to engage in, manage, or productively resolve conflict. In this process, a neutral third party (the conflict coach) works one-on-one with someone experiencing conflict with another person. Coaching enables the coachee to talk about the conflict with the conflict coach, consider options for managing the conflict, and design an approach to discuss the conflict with the other person.

Determinative dispute resolution processes are processes in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the participants) and makes a determination. Examples of determinative dispute resolution processes are arbitration and expert determination.

Dispute resolution practitioner is a person who conducts themselves impartially to assist those in dispute to resolve the issues between them. Practitioners may work for government or

in the private sector, either as part of a dispute resolution organisation or as an individual directly engaged by parties.

Early neutral evaluation (ENE) (or neutral evaluation) is a process in which the participants to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute.

Evaluative mediation is a term used to describe processes where a mediator, as well as facilitating negotiations between the participants, also evaluates the merits of the dispute and provides suggestions as to its resolution. Note: ‘evaluative mediation’ may be seen as a contradiction in terms since it is inconsistent with the definition of ‘mediation’ provided in this glossary.

Expedited arbitration is a form of arbitration in which certain modifications are introduced in order to ensure that the arbitration can be conducted and an award rendered in a shortened time frame and consequently, at a reduced cost.

Expert determination is a process in which the participants to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) and who makes a binding or non-binding determination.

Facilitation is a process in which the participants, with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the participants to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

Facilitative dispute resolution processes are processes in which a dispute resolution practitioner assists the participants to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation and facilitation.

Fact finding is a process in which the participants to a dispute present arguments and evidence to a dispute resolution practitioner (the investigator) who makes a determination as to the facts of the dispute, but who does not make any finding or recommendations as to outcomes for resolution.

Final offer arbitration is a form of arbitration in which each party submits a proposal to the arbitrator. At the conclusion of the hearing, the arbitrator is required to select one of the parties' proposals, without modification.

Joint facilitation is a form of facilitation conducted by two facilitators working together. One facilitator is submitted by each party.

Judicial dispute resolution (or judicial ADR) is a term used to describe a range of dispute resolution processes which are conducted by judges or magistrates.

Judicial settlement conferencing is a form of judicial dispute resolution involving a meeting of parties to proceedings, convened by a judge, designed to explore the possibility of a resolution of a disputed matter without a trial.

Med-arb is a hybrid process in which the dispute resolution practitioner first uses one process (mediation) and, if unsuccessful, then a different one (arbitration).

Mediation is a process in which the participants to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Negotiation is a process of exchanging information, interests, positions and proposals through direct communication of the parties in an effort to resolve a dispute.

Ombudsman (or ombudsperson or ombud) in the "classical" case is a person who is typically appointed by a legislative body to represent the public with concerns of the public with regards to the conduct of governmental agencies and conduct formal investigations. An "internal" or organisational ombudsman is a third party within an organisation who deals with conflicts on an informal and confidential basis and gives disputants information on how to resolve the problem at issue.

Shuttle mediation is an asynchronous option within the option of mediation where the mediator may move between participants who are located in different rooms, or meet different participants at different times for all or part of the process. The mediator facilitates the process by acting as a conduit for the exchange of information and conveying offers and counter offers.

Summary jury trial is a flexible, non-binding process designed to promote settlement in complex, trial-ready cases. The judge will hear an abbreviated presentation of evidence, may

offer an advisory verdict, and may offer parties an opportunity to ask questions and hear the reactions of the judge or jury.

List of Acronyms and Abbreviations

AAT	Administrative Appeals Tribunal
AATA 1975 (Cth)	Administrative Appeals Tribunal Act 1975 (Cth)
ABA	American Bar Association
ACJI	Australian Centre for Justice Innovation
ACM	Association for Conflict Resolution
ADC	Australian Disputes Centre
ADF	Approved Deposit Fund
ADR	Alternative Dispute Resolution
ADRA 1990	Administrative Dispute Resolution Act of 1990
AFM	Academy of Family Mediators
AIR	Accelerated Issue Resolution
AJAC	Appeals Judicial Approach Culture
AMINZ	Arbitrators' and Mediators' Institute of New Zealand
ANAO	Australian National Audit Office
AOD	Action on Decision
APA	Advance Pricing Agreement
ARTG	Appeals Reviews and Tribunal Guidance
ATAINZ	Accountants and Tax Agents Institute of New Zealand
ATCL	Appeals Team Case Leader
ATO	Australian Taxation Office
CA-ANZ	Chartered Accountants Australia and New Zealand
CAP	Compliance Assurance Process
CBSA	Canada Boarder Services Agency
CCRA	Canada Customs and Revenue Agency
CDR	Collaborative Dispute Resolution
CEDR	Centre for Effective Dispute Resolution
CEO	Chief Executive Officer
CGT	Capital Gains Tax
CMS	Case Management System
COO	Chief Operating Officer
CPA	Certified Practising Accountants
CPD	Continuing Professional Development
CPE	Continuing Professional Education
CRA	Canada Revenue Agency
CREnet	Conflict Resolution Education Network
CRM	Customer Relationship Manager
DR	Dispute Resolution
DRU (NZ)	Disputes Review Unit (NZ)

DRU (UK)	Dispute Resolution Unit (UK)
DSD	Dispute Systems Design
EAP	Employee Assistance Program
EAR	Early Assessment and Resolution
ENE	Early Neutral Evaluation
ER	Early Referral
FTM	Fast Track Mediation
FTMC	Fast Track Mediation – Collection
FTS	Fast Track Settlement
GST	Goods and Services Tax
GTPP	Generic Tax Policy Process
HMRC	HM Revenue and Customs
HNMCP	Harvard Negotiation and Mediation Clinical Program
IAMA	Institute of Arbitrators and Mediators Australia
ICAA	Institute of Chartered Accountants Australia
IFA	International Fiscal Association
IGT	Inspector-General of Taxation
IIR	Industry Issue Resolution
I.R.B.	Internal Revenue Bulletin
I.R.C.	Internal Revenue Code
IRD	Inland Revenue Department
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
ITAA 1936 (Cth)	Income Tax Assessment Act 1936 (Cth)
LB&I	Large Business and International
LEADR	Association of Dispute Resolvers
LEP	Limited English Proficient
LITC	Low Income Tax Clinic
LMSB	Large and Mid-Size Businesses
LSS	Litigation and Settlement Strategy
LTA	Local Taxpayer Advocate
LTS	Legal and Technical Services
MSB	Mediators Standards Board
NADRAC	National Alternative Dispute Resolution Advisory Council
NAO	National Audit Office
NOPA (NZ)	Notice of Proposed Adjustment (NZ)
NOPA (US)	Notice of Proposed Adjustment (US)
NOR	Notice of Response
NTA	National Taxpayer Advocate
NTLG	National Tax Liaison Group

NZ	New Zealand
NZICA	New Zealand Institute of Chartered Accountants
NZLS	New Zealand Law Society
OCTC	Office of the Chief Tax Counsel
OECD	Organisation for Economic Co-operation and Development
OPI	Over-the-Phone Interpreter
PAC	Public Accounts Committee
PAM	Post Appeals Mediation
PAYE	Pay As You Earn
PFA	Pre-Filing Agreement
PRU	Problem Resolution Unit
PS LA	Practice Statement Law Administration
PST	Pooled Superannuation Trust
RAP	Rapid Appeals Process
RDR	Review and Dispute Resolution
Rev. Proc.	Revenue Procedure
RRA 1998	Restructuring and Reform Act of 1998
SB/SE	Small Business/ Self-Employed
SME	Small and Medium-Sized Enterprise
SMEi	Small and Medium-Sized Enterprises and individuals
SOP	Statement of Position
SPIDR	Society of Professionals in Dispute Resolution
SPS	Standard Practice Statement
STCT	Small Taxation Claims Tribunal
TAA 1953 (Cth)	Taxation Administration Act 1953 (Cth)
TAA 1994	Tax Administration Act 1994
TAD	Taxation Appeals Division
TAO	Taxpayer Assistance Order
TAP	Taxpayers Advocacy Panel
TARP	Tax Assurance and Resolution Policy
TAS	Taxpayer Advocate Service
TDRB	Tax Disputes Resolution Board
TE/GE	Tax-Exempt and Government Entities
TIGTA	Treasury Inspector-General for Tax Administration
TMNZ	Tax Management New Zealand
TRA	Taxation Review Authority
Treas. Reg.	Treasury Regulations
TTY	Teletypewriter
UK	United Kingdom
US	United States

US GAO	United States Government Accountability Office
U.S.C.	United States Code
VAT	Value Added Tax
W&I	Wage and Investment

Abstract

Dispute systems design (DSD) refers to a deliberate effort to identify and improve the way an organisation addresses conflict by decisively and strategically arranging its dispute resolution processes. A number of principles have been put forward by various DSD practitioners for best practice in effective DSD. These principles emanate from the six fundamental DSD principles proposed by the seminal theorists Ury, Brett and Goldberg in *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* in 1988. To date, tax dispute resolution is an area that has not been extensively examined utilising DSD principles. However, with the recent trend of some tax authorities towards employing interests-based dispute resolution procedures, namely, various forms of alternative dispute resolution (ADR) processes, the application of DSD principles in the context of tax dispute resolution arguably warrants greater research.

The purpose of this study is to develop the application of DSD principles in the particular context of tax dispute resolution. Utilising a comparative case study methodology, 14 DSD principles drawn from the literature have been used to evaluate the effectiveness of the design of the current tax dispute resolution processes of the jurisdictions of New Zealand (NZ), Australia, the United Kingdom (UK) and the United States (US). Through comparing the DSD evaluations conducted, this study has sought to develop a set of tax DSD principles to be adapted by tax administrations and used in either developing new or improving existing tax dispute resolution systems. Semi-structured interviews with 30 selected stakeholders in NZ have then been conducted in order to externally evaluate the tax DSD principles developed and also consider whether adaption of the principles is required in the context of the NZ tax dispute resolution procedures.

The findings from the case studies indicate that the 14 DSD principles from the literature can generally be applied in the tax dispute resolution context without significant substantive modification. The interview findings suggest that the overarching design principle which must be borne in mind in the design of any tax dispute resolution system is that the system must be fair and perceived as fair. However, there is insufficient support from the interviews to justify any concrete changes being made to the tax DSD principles developed from the case studies. Thus, the interview findings are limited to the making of suggestions for certain modifications to the tax DSD principles potentially being made. Therefore, further research is necessary in order to confirm or refute the suggested changes. The interview findings further indicate that the tax DSD principles developed do not require adaptation specifically for NZ. Although, this may in part be due to the sample of participants interviewed being drawn only from NZ.

Against the background of the overarching design principle of fairness, this study has a wide ranging applicability to tax administrations and their stakeholders in developing or improving their tax dispute resolution systems.

Chapter 1: Introduction

1.1 Background to the Topic

Dispute systems design (DSD) involves an organisation's conscious effort to channel disputes into a series of steps or options to manage conflict.¹ DSD concerns the design and implementation of a dispute resolution system that is a series of procedures for handling disputes, rather than handling individual disputes on an ad hoc basis.² The origin of DSD can be traced to the publication of *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* by Ury, Brett and Goldberg in 1988.³ Ury, Brett and Goldberg's research drew on empirical evidence in the particular context of the unionised coal industry. The authors described how patterns of disputes can be found in closed settings and that by institutionalising avenues for addressing these disputes ex-ante, conflicts could be handled more effectively and satisfactorily than through ex-post measures.

DSD is based on three inter-related theoretical propositions. The first is that dispute resolution procedures can be categorised according to whether they are primarily interests-based, rights-based or power-based in approach.⁴ The second is that interests-based procedures have the potential to be more cost effective than rights-based procedures, which in turn may be more cost effective than power-based procedures.⁵ The third proposition is that the costs of disputing may be reduced by creating "interests-oriented" systems, that is, systems which emphasise interests-based procedures.⁶

Interests, rights and power-based approaches can be defined as follows. Interests-based approaches focus upon the underlying interests of the parties with the aim of producing solutions which satisfy as many of those interests as possible.⁷ Examples of interests-based approaches include negotiation and alternative dispute resolution (ADR) approaches such as facilitation and mediation. Rights-based approaches determine who is "right" according to an independent and objective standard such as precedent, socially accepted behavioural standards

¹ William L Ury, Jeanne M Brett and Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, Cambridge, MA, first published 1988, 1993 ed); Cathy A Costantino and Christina S Merchant *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, San Francisco, 1996); and Lisa B Bingham "Control Over Dispute-System Design and Mandatory Commercial Arbitration" (2004) 67 Law & Contemp Probs 221.

² John Lande "Principles for Policymaking About Collaborative Law and Other ADR Processes" (2007) 22 Ohio St J on Disp Resol 619 at 630.

³ Ury, Brett and Goldberg, above n 1.

⁴ At 4-9.

⁵ At 4, 10-15.

⁶ At 18.

⁷ At 6.

or legal benchmarks.⁸ Examples of rights-based approaches include adjudication and ADR processes such as arbitration and early neutral evaluation (ENE). Power-based approaches are characterised by the use of power (defined as “the ability to coerce someone into something he [or she] would not otherwise do”) and frequently involve an exchange of threats and/or acts of aggression.⁹ Examples of power-based approaches include strikes, voting and warfare.

As indicated above, DSD postulates that interests-based procedures have the potential to be the most cost-effective but also recognises that rights and power-based procedures may be necessary and desirable components of a dispute resolution system.¹⁰ Additionally, within each category of interests, rights and power-based approaches, there are low and high-cost procedures.¹¹ For example, interests-based negotiation, which takes place between the parties alone, has the potential to be a low-cost interests-based procedure. Interests-based mediation is generally a higher cost interests-based procedure.¹² For rights-based processes, expedited arbitration may provide a less costly way to determine rights than full scale arbitration, which in turn may cost less than litigation.¹³ The underlying DSD proposition is that dispute systems designers should endeavour to create interests-oriented systems that promote the resolution of disputes through the use of interests-based procedures wherever possible but also provide “low-cost ways to determine rights or power for those disputes that cannot or should not be resolved by focusing on interests alone.”¹⁴

The DSD process is comprised of a number of stages. In general, the DSD process involves assessing the needs of disputants and other stakeholders in the system; planning and designing a system to address those needs; implementing the system and providing necessary training and education for disputants and relevant dispute resolution professionals; and evaluating the system and making periodic modifications as needed.¹⁵ This study focuses on the design stage of the DSD process.

Within the design stage of DSD, a number of principles for the design of low-cost interests-oriented dispute resolution systems have been formulated by various practitioners in the DSD

⁸ At 7.

⁹ At 7.

¹⁰ At 16-17.

¹¹ At 8, 18; Bobette Wolski “The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective” (1998) 10(1) Bond LR 1 at 17.

¹² Wolski, above n 11, at 17.

¹³ At 17. Power-based approaches can also be arranged from low to high-cost. Voting can be a low-cost power procedure. Limited strikes and symbolic strikes are relatively low-cost power contests, while full strikes and lock outs are high-cost.

¹⁴ Ury, Brett and Goldberg, above n 1, at 18.

¹⁵ Lande, above n 2, at 630.

field.¹⁶ These principles emanate from six fundamental DSD principles proposed by Ury, Brett and Goldberg. Their six basic principles of DSD are as follows:¹⁷

- (1) Put the focus on interests;
- (2) Build in “loop-backs” to negotiation;
- (3) Provide low cost rights and power backups;
- (4) Build in consultation before, feedback after;
- (5) Arrange procedures in a low-to-high-cost sequence; and
- (6) Provide the necessary motivation, skills, and resources.

Although the term “principles” is used to describe the design guidelines which have been proposed by various DSD practitioners, “they are not immutable.”¹⁸ Design implies custom tailoring. The principles should be adapted to meet the needs of users of the system, the resource constraints of the particular enterprise, and the wider legislative environment within which the system operates.¹⁹ However, some of these principles are now regarded as fundamental to the general design of an effective dispute resolution system.

To date, the area of tax dispute resolution has not been evaluated extensively using DSD principles. One reason for this may be because tax disputes have traditionally not been regarded as interests-based disputes.²⁰ McDonough states that: “Tax disputes ... are more typically focused on obtaining a result, such as ‘what dollar amount to pay’” as opposed to considering the needs and interests of each party.²¹ In a tax dispute the individual interests of parties tend to be subsumed in the argument over legal rights. It is usually only when the parties enter into a form of “problem-solving” in an effort to resolve the conflict that interests are taken into account.²² Thus, Bentley asserts that conflict resolution that is rights and power-based favours the revenue administration and collection authority.²³ However, “such situations usually

¹⁶ See Ury, Brett and Goldberg, above n 1; Costantino and Merchant, above n 1; Mary P Rowe “Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?” in Sandra Gleason (ed) *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (Michigan State University Press, East Lansing, 1997) 79; Jennifer Lynch *CCRA: Contemporary Conflict Resolution Approaches* (Canada Customs and Revenue Agency, Ottawa, 1998); Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998); and Society of Professionals in Dispute Resolution *Designing Integrated Conflict Management Systems: Guidelines for Designers and Decision Makers in Organizations* (Washington DC, 2001).

¹⁷ Ury, Brett and Goldberg, above n 1, at 42.

¹⁸ Wolski, above n 11, at 18.

¹⁹ At 18.

²⁰ Duncan Bentley *Taxpayers’ Rights: Theory, Origin and Implementation* (Kluwer Law International, The Netherlands, 2007) at 183

²¹ Kirsten J McDonough “Resolving Federal Tax Disputes Through ADR” (1993) 48(2) Arb J 38 at 41.

²² Bentley, above n 20, at 181.

²³ At 183.

constitute a ‘bad’ experience for the taxpayer.”²⁴ Even though tax disputes are overtly focused on the rights of each party, an important factor is the cost of taking the matter further. Where the costs become too high for the taxpayer, the revenue authority becomes the effective arbiter of both parties’ rights as the taxpayer has to withdraw. The revenue authority’s power to impose tax, interest and penalties, or the threat to do so, may then become a further factor which influences the outcome of the dispute.²⁵ Also of relevance is that, relative to the taxpayer, the revenue authority is a “well-resourced disputant” and is also considerably more experienced as a litigant in tax disputes.²⁶

The concept of DSD originated in the context of workplace conflict. However, the DSD principles developed “have equal applicability to all other places where people convene regularly for a purpose and have continuing relationships.”²⁷ Arguably, in the tax context, taxpayers and revenue authorities have a continuing relationship with respect to the compulsory imposition of tax (and interest and penalties where applicable) by the revenue authority. However, the nature of the fundamental relationship between the tax authority and the taxpayer in a tax dispute is primarily a legal one which is distinct from a relationship concerned with the underlying needs and concerns of the parties.

The application of DSD in tax dispute resolution may thus differ from other dispute resolution contexts in the respect that the application of an interests-orientated system may be limited by the underlying legal relationship and the particular power imbalance that exists between the revenue authority and the taxpayer. In addition, in jurisdictions such as New Zealand (NZ), Australia and the United Kingdom (UK), the ultimate discretionary power of the Commissioner of the revenue authority to settle tax disputes is governed by the statutorily recognised duty of the Commissioner to maximise the taxes collected, and to foster the integrity and effective functioning of the tax system given the limited resources available to the Commissioner.²⁸ This statutory duty governs all methods of tax dispute resolution.

²⁴ At 183.

²⁵ At 181.

²⁶ Niels Campbell and Michael Hendriksen “The conference phase of the tax disputes process – what you need to know” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Wellington, 26-27 October 2012) at [10.21].

²⁷ Society of Professionals in Dispute Resolution, above n 16, at 33.

²⁸ This power is recognised in NZ, Australia and the UK in various guises such as the “Care and Management of Taxes”, the “Good Management Rule” and the “Collection and Management of Taxes”. See Tax Administration Act 1994 (TAA 1994), ss 6 and 6A; Public Governance, Performance and Accountability Act 2013 (Cth), s 15; and Commissioners for Revenue and Customs Act 2005 (UK), ss 5 and 9. Apparently there is no similar provision governing the Internal Revenue Service (IRS) and the United States (US) tax system. Email from [redacted] (Principal, Co-leader, [redacted], Washington DC) to Melinda Jone regarding the US tax dispute resolution system (6 June 2014).

Nevertheless, in most jurisdictions, certain types of taxpayers may have various forms of contact with the revenue authority. For example, under a self-assessment system (which generally relies on voluntary taxpayer compliance), companies and other entities, in particular, can have several different tax returns to self-assess may also have numerous other contacts with the revenue authority during the tax year.²⁹ A conflict arising in one area can spill over into the other areas in the way returns are completed and contacts are made. Thus, in order to reduce conflict escalation, improve their relationships with taxpayers and consequently, enhance voluntary compliance, there has been a recent trend by tax authorities internationally in employing different initiatives, including interests-based ADR processes, to resolve tax disputes without litigation.³⁰

The applicability of ADR to tax dispute resolution is not the focus of this study, as this has already been established both in the prior literature³¹ as well as in practice.³² However, as noted by Bentley, “ADR provides flow-on improvements in taxpayer compliance by making it easier to resolve disputes with revenue authorities or even to allay concerns.”³³ It also improves the effectiveness and efficiency of tax administration, as ADR focuses on avoiding time-consuming and expensive litigation before the courts.³⁴ These outcomes align with the aim of DSD in reducing the cost of handling disputes and producing more satisfying and durable resolutions. Consequently, the use of DSD principles in evaluating the design of tax dispute resolution systems is arguably an area worthy of further research.

1.2 Research Gap

The research gap in this study primarily consists of two main aspects. These aspects are discussed in sections 1.2.1 and 1.2.2 and respectively pertain to the limited use of DSD analysis in the context of tax dispute resolution to date, and the lack of DSD analytical frameworks for

²⁹ Bentley, above n 20, at 183.

³⁰ Bentley, above n 20; EY *Tax Dispute Resolution: A New Chapter Emerges – Tax Administration Without Borders* (2010); Inspector-General of Taxation *Review into the Australian Taxation Office’s Use of Early and Alternative Dispute Resolution: A Report to the Assistant Treasurer* (Sydney, May 2012).

³¹ See, for example, Mark Keating “Comment: New Zealand’s tax dispute procedure: Time for a change” (2008) 14 NZJTL 425; Melinda Jone and Andrew J Maples “Mediation as an alternative option in Australia’s tax disputes resolution process” (2012) 27(3) ATF 527; Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand’s Tax Dispute Resolution Procedures” (2012) 18 NZJTL 412; Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand’s Tax Disputes Resolution Procedures: Refining a Proposed Regime” (2013) 19 NZJTL 301; Neil Russ and Sam Davies “A better way of resolving tax disputes?” (2013) 92(7) Chartered Acct J 71; Nicola White “Mediating Tax Disputes: Global Developments” (12 December 2013) CEDR <<http://www.cedr.com/articles/?item=Mediating-Tax-Disputes-Global-Developments>> (last accessed 7 November 2016).

³² A number of countries around the world currently utilise ADR in their tax dispute resolution procedures. These are outlined in section 1.5 of this chapter.

³³ Bentley, above n 20, at 172.

³⁴ At 172.

analysing dispute resolution systems both generally and in the tax dispute resolution context.

1.2.1 Dispute systems design in the context of tax dispute resolution

DSD originated in the ADR movement within the context of organisational conflict and workplace disputes.³⁵ DSD is not a dispute resolution methodology itself. Rather it is “the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system.”³⁶ Nabatchi and Bingham observe that: “All organizations have dispute systems (by design or not); however, those dispute systems are not always effective at minimizing the various dysfunctional conflicts experienced by organizations.”³⁷ However, the ideas of DSD have grown in popularity as organisations have recognised their potential to produce satisfactory dispute outcomes in a timely, efficient, and cost-sensitive manner. Robinson, Pearlstein and Mayer state that:³⁸

Many corporations have embraced the concept of “dispute systems design,” both in order to avoid the expense and destructiveness of individual dispute litigation, and because they realize that improved communication and conflict handling are key to the development of high performance organizations.

Bingham notes that organisational DSDs can take a “myriad of forms, including a multi-step procedure culminating in mediation, arbitration, ombudspersons programs giving disputants many different process choices, or simply a single-step binding arbitration design.”³⁹ Although, Nabatchi and Bingham state that “most effective dispute systems have at least one ADR process option, with mediation generally being the preferred choice.”⁴⁰ This follows from the proposition that: “In general, interest-based approaches are cheaper and more effective than rights-based approaches, which are cheaper and more effective than power-based approaches.”⁴¹

³⁵ Susan D Franck “Integrating Investment Treaty Conflict and Dispute Systems Design” (2007) 92 Minn L Rev 161 at 177.

³⁶ At 178.

³⁷ Tina Nabatchi and Lisa B Bingham “From Postal to Peaceful: Dispute Systems Design in the USPS REDRESS Program” (2010) 30 Rev Pub Personnel Admin 211 at 212.

³⁸ Peter Robinson, Arthur Pearlstein and Bernard Mayer “DyADS: Encouraging ‘Dynamic Adaptive Dispute Systems’ in the Organized Workplace” (2005) 10 Harv Negot L Rev 339 at 343.

³⁹ Lisa B Bingham “Designing Justice: Legal Institutions and Other Systems for Managing Conflict” (2008) 24 Ohio St J on Disp Resol 1 at 11.

⁴⁰ Nabatchi and Bingham, above n 37, at 213.

⁴¹ At 213.

The field of dispute resolution has broadly adapted the concept of DSD beyond organisations with employment conflict and courts to other legal and administrative contexts.⁴² There are now growing numbers of conflict management or dispute resolution programs in the substantive areas of education, the environment, criminal justice, community or neighbourhood justice, domestic relations and family law and in settings ranging from federal, state, and local governments to a variety of private and non-profit organisations.⁴³

However, with respect to DSD in the context of tax dispute resolution, Bentley states that: “The layers of dispute resolution within tax systems are a relatively recent phenomenon.”⁴⁴ Furthermore, as noted above in section 1.1, there is a growing trend towards the use of ADR processes in tax dispute resolution around the world.⁴⁵ Both tax administrations and taxpayers are recognising that “ADR may allow more tax disputes to be resolved earlier, or avoided altogether, thereby giving both parties greater certainty and the ability to channel scarce resources into more productive activities.”⁴⁶ In addition, Bentley states that “the focus of these mechanisms on a problem-solving approach to dispute resolution is consistent with the current emphasis by revenue authorities on building and maintaining strong compliance relationships with taxpayers.”⁴⁷

Hence, the movement towards ADR processes in tax dispute resolution generally accords with revenue authorities “moving away from a ‘command and control’ culture to one designed to build trust, support and respect in the community” which in turn encourages voluntary compliance.⁴⁸ It is also consistent with the body of literature⁴⁹ which posits an “expanded ‘service’ paradigm which recognises the role of enforcement, but also emphasises the role of

⁴² Bingham, above n 39, at 11.

⁴³ At 11-12. For review articles on the use of DSD in the contexts of employment, education, the environment, criminal justice, family disputes, civil litigation in courts, and community disputes, see Symposium “Conflict Resolution in the Field: Assessing the Past, Charting the Future” (2004) 22 Conflict Resol Q 1.

⁴⁴ Bentley, above n 20, at 172.

⁴⁵ EY, above n 30; Inspector-General of Taxation, above n 30.

⁴⁶ EY, above n 30, at 4.

⁴⁷ Bentley, above n 20, at 172.

⁴⁸ At 166.

⁴⁹ See, for example, James Alm and Jorge Martinez-Vazquez “Institutions, paradigms, and tax evasion in developing and transition countries” in James Alm and Jorge Martinez-Vazquez (eds) *Public Finance in Developing and Transition Countries* (Edward Elgar Publishing, Cheltenham, UK and Northampton, MA, 2003) 147; Doreen McBarnet “When compliance is not the solution but the problem: From changes in law to changes in attitude” in Valerie Braithwaite (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing, Aldershot, 2003) 229; Valerie Braithwaite “Dancing with tax authorities: Motivational postures and non-compliant actions” in Valerie Braithwaite (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing, Aldershot, 2003) 15; Erich Kirchler, Erik Hoelzl and Ingrid Wahl “Enforced versus voluntary tax compliance: The ‘slippery slope’ framework” (2008) 29 J Econ Psychol 210; James Alm, Todd Cherry, Michael Jones and Michael McKee “Taxpayer information assistance services and tax compliance behavior” (2010) 31 J Econ Psychol 577; James Alm and Benno Torgler “Do Ethics Matter? Tax Compliance and Morality” (2011) 101 J Bus Ethics 635.

the tax administration as a facilitator and a provider of services to taxpayer-citizens.”⁵⁰ In practice, various tax administrations around the world, including Inland Revenue in NZ,⁵¹ the Australian Taxation Office (ATO) in Australia,⁵² HM Revenue and Customs (HMRC) in the UK⁵³ and the IRS in the US,⁵⁴ are currently undertaking forms of modernisation programmes or reinvention projects aimed at, among other things, simplifying (and digitalising) tax administration, and transforming into more service-orientated organisations. One reason for these changes is to increase voluntary compliance by having a simpler tax system⁵⁵ and through improving the “client” experience.⁵⁶

Furthermore, the former Australian Commissioner of Taxation, Michael D’Ascenzo has observed that:⁵⁷

Procedural fairness, courtesy and integrity underpin a world class tax administration. This is important because the success of any tax system is highly dependent on people’s propensity to voluntarily comply with their tax obligations.

In addition, the Organisation for Economic Co-operation and Development (OECD) Centre for Tax Policy and Administration has noted that “[t]axpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.”⁵⁸ It thus follows that DSDs incorporating ADR processes also align with the procedural justice research⁵⁹ which concerns “the perceived fairness of the procedures involved in decision-

⁵⁰ Alm, Cherry, Jones and McKee, above n 49, at 577.

⁵¹ Inland Revenue “Business transformation: Inland Revenue is changing” (6 September 2016) <<http://www.ird.govt.nz/transformation/how-changing/>> (last accessed 7 November 2016).

⁵² Australian Taxation Office “Reinventing the ATO” (16 September 2016) <<https://www.ato.gov.au/About-ATO/About-us/Reinventing-the-ATO/>> (last accessed 7 November 2016).

⁵³ HM Revenue and Customs “HMRC announces next step in its ten-year modernisation programme” (23 November 2015) <<https://www.gov.uk/government/publications/issue-briefing-hmrc-announces-next-step-in-its-ten-year-modernisation-programme/hmrc-announces-next-step-in-its-ten-year-modernisation-programme-to-become-a-tax-authority-for-the-future>> (last accessed 7 November 2016).

⁵⁴ Internal Revenue Service “IRS Future State” (4 March 2016) <<https://www.irs.gov/uac/newsroom/irs-future-state>> (last accessed 7 November 2016).

⁵⁵ Inland Revenue, above n 51.

⁵⁶ Australian Taxation Office *Reinventing the ATO – Program Blueprint* (Canberra, March 2015) at 2.

⁵⁷ Michael D’Ascenzo “It is the Community’s Tax System” (2006) 2(1) JATTA 9 at 13.

⁵⁸ Organisation for Economic Co-operation and Development Centre for Tax Policy and Administration *Principles of Good Tax Administration – Practice Note* (GAP001, 21 September 2001) at 3, [3].

⁵⁹ See, for example, Edgar A Lind and Tom R Tyler *The Social Psychology of Procedural Justice* (Plenum, New York, 1988); Tom R Tyler *Why Citizens Obey the Law: Procedural Justice, Legitimacy and Compliance* (Yale University Press, New Haven, 1990); Tom R Tyler “The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities” (1997) 1 Pers Soc Psychol Rev 323; Kristina Murphy “Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance” (2005) 32 J Law & Soc 562.

making and the perceived treatment one receives from a decision maker.”⁶⁰ The studies in this area demonstrate that people’s reactions to their personal experiences with authorities are rooted in their evaluations of the fairness of procedures those agencies use to exercise their authority.⁶¹ People who feel treated in a procedurally fair manner by authorities tend to attribute greater legitimacy and trustworthiness to them, and perceiving authorities as legitimate and trustworthy, they are more willing to comply voluntarily.⁶² Moreover, this has been found regardless of the decision outcome.⁶³

Notwithstanding the global trend towards the use of ADR in tax dispute resolution, to date the concept of DSD has not been extensively used in analysing the effectiveness of the design of tax dispute resolution systems around the world. To the researcher’s knowledge, currently only two researchers have undertaken studies utilising DSD principles in analysing dispute resolution systems (and complaint handling systems) in the tax context.⁶⁴ These studies were conducted in Australia by Bentley⁶⁵ and Mookhey.⁶⁶ Bentley’s and Mookhey’s studies analyse the effectiveness of the design of the ATO’s complaint handling and tax dispute resolution procedures, respectively, utilising Ury, Brett and Goldberg’s six DSD principles. Given the limited research in utilising DSD to analyse tax dispute resolution systems, this study seeks to expand the research in this area, namely through analysing a number of different countries and utilising a more comprehensive range of DSD principles in the analysis.

1.2.2 Lack of dispute systems design analysis frameworks

This study focuses on evaluating the design of tax dispute resolution systems as distinct from evaluating the functioning of tax dispute resolution systems in practice. Accordingly, this study does not seek to provide an empirical evaluation of the effectiveness of the actual functioning

⁶⁰ Murphy, above n 59, at 566.

⁶¹ Lind and Tyler, above n 59; Tom R Tyler and Steven L Blader *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement* (Psychology Press, Philadelphia, PA, 2000).

⁶² Murphy, above n 59, at 566.

⁶³ At 566. Procedural justice (or procedural fairness) is a commonly referred to dimension of fairness in the context of tax dispute resolution. However, other dimensions of fairness referred to in DSD, as outlined in the organisational justice literature, include: distributive fairness (relating to the perceived fairness of the outcomes received); interpersonal fairness (relating to the quality of the interpersonal treatment received when procedures are enacted); and informational fairness (relating to perceptions of the accuracy, relevance, ease of understanding and timeliness of information received). For further information, see Yochi Cohen-Charash and Paul Spector “The Role of Justice in Organizations: A Meta-Analysis” (2001) 86 *Organ Behav Hum Decis Process* 278; Jason A Colquitt, Donald E Conlon, Michael J Wesson, Christopher OLH Porter and K Yee Ng “Justice at the Millennium: A Meta-Analytic Review of 25 years of Organizational Justice Research” (2001) 86 *J Applied Psychol* 425; Nabatchi and Bingham, above n 37.

⁶⁴ The researcher has subsequently added to these studies. See “Publications Informing and Incorporated into this Thesis”, at page xi of this thesis.

⁶⁵ Duncan Bentley “Problem resolution: Does the ATO approach really work?” (1996) 6(1) *Revenue LJ* 17, updated in Bentley, above n 20, at ch 5.

⁶⁶ Sheena Mookhey “Tax dispute systems design” (2013) 11 *EJTR* 79.

of tax dispute resolution systems. The literature identifies metrics such as efficiency, equity and voice as being relevant for conducting such an evaluation.⁶⁷ Budd and Colvin outline that the metric of efficiency concerns the effective use of scarce resources, in particular time and money; equity relates to fairness and justice; and voice concerns the ability to participate and affect decision making.⁶⁸ Thus, an evaluation of the effectiveness of the functioning of a dispute resolution system generally analyses the system in terms of what the system seeks to achieve (using concepts such as efficiency, equity and voice). Whereas in evaluating the design of dispute resolution systems, this study looks at how the system achieves these objectives (through using DSD principles).

With respect to evaluating the design of dispute resolution systems, a number of models for designing and implementing organisational conflict management systems have been proposed in the literature.⁶⁹ However, some DSD commentators⁷⁰ claim that:⁷¹

The conflict management models and theory developed by practitioners have been built on experience and have shown significant results, but the premises that shape the models need to be articulated and tested.

Roche and Teague also note that much of the DSD literature is:⁷²

... highly prescriptive and draws heavily on ...descriptive data concerning the prevalence of such systems and their associated dispute resolution practices, especially in the United States. Rigorous empirical studies conducted to test theory are few so far.

Furthermore, within the DSD literature, there is no framework which has been developed for the purpose of analysing dispute resolution systems generally. Barendrecht states that:⁷³

⁶⁷ See John W Budd and Alexander JS Colvin “Improved metrics for workplace dispute resolution procedures: efficiency, equity, and voice” (2007) 47 *Indus Rel* 460. See also, Costantino and Merchant, above n 1, at 168-186, who outline similar goals of dispute resolution systems as including: efficiency, effectiveness and satisfaction with the process, relationship and outcomes.

⁶⁸ Budd and Colvin, above n 67, at 463.

⁶⁹ Six main DSD authors have proposed conflict management models in the DSD literature (see above n 16).

⁷⁰ For example, John P Conbere “Theory Building for Conflict Management System Design” (2001) 19 *Conflict Resol Q* 215 and Stephanie Smith and Janet Martinez “An Analytic Framework for Dispute Systems Design” (2009) 14 *Harv Negot L Rev* 123.

⁷¹ Conbere, above n 70, at 234.

⁷² William Roche and Paul Teague “Do Conflict Management Systems Matter?” (2012) 51 *Hum Resource Mgmt* 231 at 231.

⁷³ Maurits Barendrecht “In Search of Microjustice: Five Basic Elements of a Dispute System” (Tilburg University Legal Studies Working Paper No. 002/2009, 29 January 2009) at 4.

Within this emerging discipline, attempts have been made to establish design principles for setting up dispute systems, but this has not yet led to a generally accepted framework for analyzing existing dispute systems, and evaluating their performance. Such a framework can also be useful for coordinating efforts to improve dispute systems.

Although, as noted in section 1.1 above, DSD necessarily implies “custom tailoring.”⁷⁴ Tully states that the DSD principles which have been developed for use in the design process are “guidelines rather than fixed rules.”⁷⁵ DSD principles should thus, be adapted to, inter alia, the requirements of the organisation and the particular needs of users of the system.⁷⁶ Nevertheless, the above calls for further research in testing the DSD models and theory proposed in the literature as well as calls for the development of a DSD framework for analysing the design of dispute resolution systems provide a further reason for undertaking this study. Furthermore, the development of a DSD framework may be beneficial given that, as noted by Costantino and Merchant:⁷⁷

Typically ... conflict in organizations is viewed and managed in a piecemeal, ad hoc fashion, as isolated events, which are sometimes grouped by category if the risk exposure is great enough but that are rarely examined in the aggregate to reveal patterns and systemic issues.

Accordingly, this study seeks to contribute to the DSD research through applying the DSD principles established in the literature in the context of taxation and subsequently developing a tax DSD framework. Thus, as stated in section 1.2.1 above, an evaluation of the tax dispute resolution systems of a number of countries using a comprehensive range of DSD principles, will be conducted. Following this, a framework of general tax DSD principles which can be applied (and adapted, if necessary) by different jurisdictions in analysing the effectiveness of the designs of their tax dispute resolution systems, will be developed.

1.3 Objectives of the Research and Research Questions

This study aims to develop the application of DSD principles in the particular context of tax dispute resolution through the development of guidance in tax DSD principles. The guidance will be developed following the DSD evaluations of the tax dispute resolution systems of a number of selected jurisdictions. External evaluation of the guidance developed will then be sought from interviews conducted with stakeholders in NZ. Accordingly, there are three interrelated objectives of this study. The first objective is to evaluate the effectiveness of the

⁷⁴ Wolski, above n 11, at 18.

⁷⁵ *The Laws of Australia* (2013) vol 13(6) Dispute Systems Design at [13.6.360].

⁷⁶ Wolski, above n 11, at 18.

⁷⁷ Costantino and Merchant, above n 1, at xiii.

design of the current tax dispute resolution systems of NZ, Australia, the UK and the US using DSD principles.⁷⁸ The second objective is to identify similarities and differences in the DSD evaluations of the selected jurisdictions in endeavour to develop a set of general tax DSD principles to be adapted by tax administrations in either developing or improving their tax dispute resolution procedures from a DSD perspective. Using feedback sought from NZ stakeholders, the third objective is to evaluate (and modify, if necessary) the general tax DSD principles developed and then adapt (if necessary) the guidance in the context of the NZ tax dispute resolution procedures.

These objectives are addressed through several research questions which are stated below:

- RQ 1: *How do the designs of the tax dispute resolution systems of NZ, Australia, the UK and the US compare when they are evaluated using DSD principles?*
- RQ 2: *What general guidance in DSD principles in the context of tax dispute resolution can be derived from the DSD evaluations conducted in RQ 1 and the feedback from the interviews?*
- RQ 3: *How can the general guidance in DSD principles in the context of tax dispute resolution (derived in RQ 2) be adapted in the context of the NZ tax dispute resolution procedures?*

1.4 Overview of Research Methodology

The two main paradigms that are traditionally presented as being fundamentally opposed are those of positivism/postpositivism and interpretivism/constructivism.⁷⁹ The positivist approach seeks objectivity in the explanation of social reality.⁸⁰ In contrast, interpretivism seeks to provide an understanding of social reality based on the subjective interpretation of the researcher.⁸¹ Against the background of these opposing paradigms, this study is guided by the alternative research paradigm of pragmatism. Creswell and Plano Clark state that pragmatism sidesteps the contentious issues of truth and reality, accepts, philosophically, that there are singular and multiple realities that are open to empirical inquiry and orients itself toward

⁷⁸ Section 1.5 of this chapter contains the rationale behind the selection of the countries.

⁷⁹ Martina Yvonne Feilzer “Doing Mixed Methods Research Pragmatically: Implications for the Rediscovery of Pragmatism as a Research Paradigm” (2010) 4 J Mixed Methods Res 6 at 6.

⁸⁰ Margaret McKerchar *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Pyrmont, 2010) at 72.

⁸¹ At 75.

solving practical problems in the “real world”.⁸² In this respect, pragmatism allows the researcher to be free of mental and practical constraints imposed by the “forced choice dichotomy between postpositivism and constructivism.”⁸³ Thus, researchers do not have to “be the prisoner of a particular method or technique”.⁸⁴

McKerchar additionally states that pragmatists start with an open mind seeking to gain a deep understanding of the phenomenon under study and as such, “freely choose the methods, techniques and procedures that best meet the needs and purposes of the research.”⁸⁵ Accordingly, this supports the use of doctrinal legal analysis, comparative analysis and semi-structured interviews in order to best meet the needs and purposes of this study. Through case studies of the four selected jurisdictions, doctrinal legal analysis and comparative analysis are employed to describe the four jurisdictions’ tax dispute resolution systems, and evaluate and compare the dispute resolution systems using DSD principles. Inductive reasoning is applied to the above analysis in order to develop guidance in best practice tax DSD principles. Semi-structured interviews with NZ stakeholders are then used to seek external feedback on the tax DSD guidance developed and consequently adapt, if necessary, the tax DSD guidance in the context of the NZ tax dispute resolution procedures.

1.5 Selection of Countries

The four countries, NZ, Australia, the UK⁸⁶ and the US, were selected for this study primarily on the basis that they had the most information available on the ADR processes utilised in their tax dispute resolution systems. In addition, NZ has been included as this is the jurisdiction in which the researcher resides. Other countries with ADR processes in their tax dispute resolution systems were considered, namely from a list of countries identified in a report on ADR in tax dispute resolution by EY in 2010, *Tax Dispute Resolution: A New Chapter Emerges – Tax Administration Without Borders*.⁸⁷ EY identified the following countries as having post-filing ADR processes:⁸⁸

⁸² John W Creswell and Vicki L Plano Clark *Designing And Conducting Mixed Methods Research* (Sage, Thousand Oaks, 2007) at 20-28.

⁸³ At 27.

⁸⁴ Colin Robson *Real World Research: A Resource for Social Scientists and Practitioner-Researchers* (Blackwell, Oxford, 1993) at 291.

⁸⁵ McKerchar, above n 80, at 79.

⁸⁶ The UK is not a country, but a union of countries including England, Northern Ireland, Scotland and Wales. However, for the purpose of this study the UK is treated as a country because of the close economic and political ties between the countries in the union and given that HMRC is the tax authority for all of the countries in the union.

⁸⁷ See EY, above n 30.

⁸⁸ EY looked at the ADR processes including advance pricing agreements (APAs), pre-filing ADR and post-filing ADR, in 21 countries. However, the ADR processes which are included in this study are post-filing ADR processes only (see chapter 2, section 2.2.1 of this thesis for a further discussion).

- Australia
- Belgium
- Canada
- China
- Germany
- India
- Italy
- Mexico
- The Netherlands
- South Africa
- Turkey
- UK
- US

Somewhat surprisingly, New Zealand was not included as one of the countries identified as having ADR processes in their tax dispute resolution systems. However, other sources have identified NZ as including ADR within its tax dispute resolution system.⁸⁹ Further countries in addition to the above were identified by the researcher, via a search on Google, as including ADR processes in their tax dispute resolution procedures. These countries included:

- Bangladesh
- Pakistan
- Philippines
- Portugal

Many countries were unable to be selected as they either did not feature post-filing ADR processes in their current tax dispute resolution systems⁹⁰ or if they did, there was relatively limited information available on the ADR processes utilised.⁹¹ The limited amount of information available from these countries indicated that a detailed analysis of the effectiveness of the design of the tax dispute resolution systems (incorporating their ADR processes) would not be able to be conducted utilising DSD principles.

⁸⁹ For example, Campbell and Hendriksen, above n 26, at [4.12]; Inspector-General of Taxation, above n 30, at 8, [1.44]; and Graham Tubb “Tax Disputes Procedures: A Current Snapshot” (paper presented to New Zealand Law Society Tax Conference, Auckland, 5 September 2013) 149 at 154, regard Inland Revenue’s conference facilitation process as a form of ADR. For further details on the facilitation process, see section 1.1.2.1 of Appendix 1.1 of this thesis.

⁹⁰ For example, Brazil, France, Hong Kong, Indonesia, Japan, Russia, Singapore, South Korea, Vietnam.

⁹¹ For example, Bangladesh, Belgium, China, Germany, India, Italy, Mexico, Pakistan, Philippines, Portugal, the Netherlands, South Africa, Turkey.

For the purposes of this study, it is fitting that the four jurisdictions: NZ, Australia, the UK and the US, have a common legal heritage based on the common law⁹² together with a similar culture, are at a similar stage of industrial and economic development whilst having historical connections, close economic relationships and Anglo-American traditions, as these factors provide common grounds for undertaking a comparative analysis. NZ, Australia, the UK, the US and Canada are the major western, common law countries which are traditionally compared against each other. However, Canada has been excluded from this study. Notwithstanding that the EY report identifies a “Mediation process for Appeals” utilised by the Canada Revenue Agency (CRA),⁹³ a search by the researcher on the CRA website and subsequent correspondence with a Canadian tax practitioner and academic confirmed the EY report to be “misinformed.”⁹⁴ That is, while tax mediation has been considered by the CRA in the past,⁹⁵ there is currently no mediation process in place for resolving tax disputes.⁹⁶

In line with the principles of pragmatism, NZ was selected as a country within which the general guidance in tax DSD principles developed could be adapted given that this is the jurisdiction in which this research is being conducted. Moreover, despite a number of reviews and amendments to the current NZ tax dispute resolution procedures since their enactment under Part IVA TAA 1994 in 1996, commentators and professional organisations in NZ have raised various concerns with respect to their operation. Many of these concerns can be referred back to a joint submission to Inland Revenue prepared by the Taxation Committee of the New Zealand Law Society (NZLS) and the former National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA)⁹⁷ in August 2008.⁹⁸ This submission led to lengthy discussions between NZLS, NZICA and Inland Revenue and resulted in various administrative

⁹² An exception is the US state of Louisiana where state law is based on French and Spanish civil law. However, federal laws in Louisiana are based on common law.

⁹³ EY, above n 30, at 31.

⁹⁴ Email from [redacted] (Counsel, [redacted], Canada and Assistant Professor, [redacted], Canada) to Melinda Jone regarding mediation in the CRA (28 March 2014).

⁹⁵ See Deen C Olsen “Alternative Dispute Resolution” (paper presented to the Forty-Ninth Canadian Tax Foundation Tax Conference, 1997) *Report of the Proceedings of the Forty-Ninth Tax Conference* (Canadian Tax Foundation, Toronto, 1998).

⁹⁶ Karen Stilwell “Mediation of Canadian Tax Disputes” (Master of Laws Thesis, University of Toronto, 2014).

⁹⁷ From 1 July 2014 Chartered Accountants Australia and New Zealand (CA-ANZ) was launched as the new trading name merging the former Institute of Chartered Accountants Australia (ICAA) and NZICA. The name Chartered Accountants Australia and New Zealand (or CA-ANZ) will be used hereafter in this thesis, except for instances where it is more applicable to refer to the former NZICA.

⁹⁸ See Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, August 2008).

improvements to the process (including the introduction of conference facilitation)⁹⁹ as well as some legislative reforms made in 2010-2011.¹⁰⁰

In particular, it has been argued that the dispute process is stacked too heavily in favour of the Commissioner of Inland Revenue and that taxpayers are suffering from “burn off” due to the costs and complexity involved with the procedures.¹⁰¹ Notwithstanding the abovementioned improvements to the procedures, to date it appears that these views of the NZ tax dispute resolution procedures have largely remained unchanged.¹⁰² Consequently, a number of suggestions have been made for the greater use of ADR processes by Inland Revenue.¹⁰³ The ongoing dialogue between Inland Revenue and various stakeholders therefore, provides a relevant background against which to seek feedback on the guidance in tax DSD developed as well as to adapt the guidance in the context of the NZ tax dispute resolution procedures.

1.6 Significance of the Research

Scholars such as Bentley claim that: “For all tax systems, dispute system design within the tax administration is becoming critical to the successful engagement of taxpayers with the system.”¹⁰⁴ Research further suggests that there are clear benefits of providing a wide range of dispute mechanisms to resolve conflict generally and moreover, some tax administrations have proved the successful use of ADR mechanisms designed to operate in the tax context.¹⁰⁵

⁹⁹ See Inland Revenue “Changes to the disputes resolution process” (12 July 2010) <<http://www.ird.govt.nz/technical-tax/general-articles/changes-to-disputes-res-proc.html>> (last accessed 7 November 2016).

¹⁰⁰ As enacted by the Taxation (Tax Administration and Remedial Matters) Act 2011.

¹⁰¹ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants, above n 98, at [2.1(d)].

¹⁰² See, for example, Mark Keating and Michael Lennard “Developments in tax disputes – Another step backwards?” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Auckland, 11-12 November 2011); Shelley Griffiths “Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process” (paper presented to Australasian Tax Teachers Association Conference, Sydney, 17 January 2012); Susan Glazebrook “Taxation Disputes in New Zealand” (paper presented to the Australasian Tax Teachers Association Conference, Auckland, 22 January 2013); Denham Martin “Honest Taxpayers Need Advocates and Real Rights” (2013) 212 NZLawyer 22; Fred Ward “Changes to the Disputes Resolution Process – A Practitioner’s Perspective” (paper presented to the New Zealand Law Society Tax Conference, Auckland, 5 September 2013) 165; Sarah Miles “The Price we Pay for a Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation?” (2015) 46 VUWLR 361; Alison Pavlovich “The Tax Disputes Process and Taxpayer Rights: Are the Inconsistencies Proportional?” (2016) 22 NZJTL 70.

¹⁰³ See, for example, Keating, above n 31; James Peck and Andrew J Maples “Comment: The Tax Disputes Resolution Process in New Zealand: What about the Little Fellas?” (2010) 16 NZJTL 348; Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *Disputes: A Review, July 2010* (Wellington, September 2010); PricewaterhouseCoopers “Submission on the Taxation (Tax Administration and Remedial Matters) Bill” (18 February 2011); Jone and Maples “Mediation as an Alternative Option in New Zealand’s Tax Dispute Resolution Procedures”, above n 31; Jone and Maples “Mediation as an Alternative Option in New Zealand’s Tax Disputes Resolution Procedures: Refining a Proposed Regime”, above n 31; Russ and Davies, above n 31.

¹⁰⁴ Bentley, above n 20, at 408.

¹⁰⁵ Bentley, above n 20; EY, above n 30.

Nevertheless, to date, limited research has been conducted to examine the effectiveness of tax dispute resolution systems (incorporating ADR processes) from a DSD perspective. Through evaluating the tax dispute resolution systems of four selected jurisdictions using DSD principles, this cross-jurisdictional study broadens the existing research in this area, in particular, outside of Australia. Furthermore, in the process of doing so, this study also provides a detailed overview of the current tax dispute resolution systems of the four selected jurisdictions.

This study also responds to calls by commentators in the DSD field that further research is necessary in testing the DSD models developed by practitioners and that a DSD framework for analysing dispute resolution systems is needed.¹⁰⁶ In the process of developing a DSD framework in the tax context, this research additionally provides a comprehensive synthesis of the DSD principles proposed in the prior literature. Moreover, the development of the tax DSD framework in this study may potentially provide guidance for DSD practitioners to follow in building DSD best practice frameworks in other (non-tax) contexts featuring dispute resolution systems.

A tax DSD framework may be of benefit to revenue authorities and policymakers around the world through providing DSD guidance to follow in either improving existing or developing new tax dispute resolution procedures. Improving tax dispute resolution procedures can in turn enhance taxpayers' perceptions of fairness of the tax administration overall and thereby, potentially improve voluntary compliance.¹⁰⁷ An ultimate outcome of this research (albeit beyond the scope of this present study) would be for the theoretical tax DSD principles developed to be tested in practice by policymakers. Although, as noted in section 1.1 above, the application of the tax DSD guidance developed (and of interests-based procedures) may, among other things, be limited by the fact that in a tax dispute the individual interests of the parties tend to be subsumed in the argument over legal rights. That is, the fundamental relationship between the parties in dispute is a legal one as opposed to one concerning the underlying needs and concerns of the parties.

1.7 Structure of the Thesis

This chapter has provided a background to the thesis topic, identified gaps in the research, outlined the research objectives and questions, provided an overview of the research methodology, justified the choice of countries selected for this study and discussed the significance of the research. The remainder of the thesis is structured as follows.

¹⁰⁶ Conbere, above n 70; Roche and Teague, above n 72; Barendrecht, above n 73.

¹⁰⁷ Bentley, above n 20, at 172. See also, Organisational Review Committee *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* (Wellington, 1994) at [10].

Chapter 2 will discuss certain definitional aspects of the study and review selected prior DSD literature. An overview of the DSD field will be provided and the four stages of the DSD process will be outlined. The principles for best practice in effective DSD in the literature will be reviewed through conducting a documentary analysis of six conflict management models proposed by previous DSD authors. From this analysis, an initial framework of DSD principles to be utilised in evaluating the tax dispute resolution systems of the four selected jurisdictions in this study will be derived. Following this, the extant studies utilising DSD principles in evaluating tax dispute resolution systems by Bentley and Mookhey will be discussed.

Chapter 3 will present the research paradigm and methodological approaches utilised in this study. Justification for the pragmatism research paradigm adopted will be provided. The incorporation of the black letter law and comparative research approaches in this study will be outlined. Details in relation to the design and conduct of the case studies and semi-structured interviews, will then be discussed. This will include a description of the documentary evidence utilised for the case studies and of the sample of stakeholders selected for the interviews.

Chapters 4 and 5 will present the case studies of the four jurisdictions. Chapter 4 will present the case studies of the two Australasian jurisdictions (NZ and Australia) and chapter 5 will contain the case studies of the two non-Australasian jurisdictions (the UK and the US). In each of these chapters, the current tax dispute resolution procedures of the selected jurisdictions will first be set out and an evaluation of the effectiveness of the design of these procedures against the initial framework of DSD principles (derived in chapter 2) will then be conducted.

Chapter 6 will consequently summarise the case study findings from chapters 4 and 5. Similarities and differences in the DSD principles applied by the four jurisdictions will be identified and compared. As a result, guidance in tax DSD principles for tax administrations will be developed.

Chapters 7 and 8 will discuss the feedback received from the interviews conducted with the selected NZ stakeholders on the tax DSD principles developed in chapter 6. Chapter 7 will present the interview findings on the tax DSD principles in the general context and based on these findings, chapter 8 will outline suggested changes to the tax DSD principles. In addition, chapter 8 will further discuss the interview findings on the tax DSD principles in the NZ context and subsequently, make recommendations with respect to the application of the suggested changes to the tax DSD principles in the context of the NZ tax dispute resolution procedures.

Lastly, chapter 9 will provide an overview of the research and its findings, and discuss the contributions of the study to the literature and to the fields of tax dispute resolution and DSD. The limitations of the thesis, suggestions for future areas of research and concluding remarks will also be presented.

Chapter 2: Definitional Aspects and Literature Review

2.1 Introduction

The purpose of this chapter is to present certain definitional aspects relevant to this study and review selected prior literature on dispute systems design (DSD). This chapter is organised as follows. Section 2.2 discusses some of the definitional aspects with respect to tax disputes and alternative dispute resolution (ADR) in the context of tax dispute resolution. Section 2.3 provides a background to the field of DSD. Section 2.4 outlines the four general stages of the DSD process. Section 2.5 reviews six conflict management models proposed in the DSD literature and their associated DSD principles. Section 2.6 then provides a summary of the six models. Section 2.7 consequently derives an initial framework of DSD principles to be utilised in evaluating the tax dispute resolution systems of the selected jurisdictions in this study. Following this, section 2.8 outlines the extant studies conducted by Bentley¹ and Mookhey² which utilise DSD principles in the context of evaluating tax dispute resolution systems. Lastly, section 2.9 provides a chapter summary.

2.2 Definitional Aspects

The following subsections discuss selected definitional aspects pertaining to tax disputes (section 2.2.1) and ADR in the context of tax dispute resolution (section 2.2.2).

2.2.1 Tax disputes

Tax disputes between taxpayers and tax authorities are a common feature of modern tax systems around the world. Conventionally, they are said to occur when there is a disagreement between the taxpayer and the tax authority in respect of the taxpayer's tax liabilities or entitlements and related issues.³ This is the definition of tax disputes that has been adopted for the purposes of this study. Although, in principle, there are several types of tax disputes. Some of them do not involve the tax authority as a party. These may arise between two or more parties in a legal agreement or commercial dealing.⁴ For example, one of the parties may disagree with the meaning of a contractual agreement, or the operation of a statute, and whether or to what extent a tax is payable by one of the parties.⁵ In addition, some tax disputes may not directly involve the taxpayer as a party. Such tax disputes can occur where there is

¹ Duncan Bentley "Problem resolution: Does the ATO approach really work?" (1996) 6(1) Revenue LJ 17, updated in Duncan Bentley *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer Law International, The Netherlands, 2007) ch 5.

² Sheena Mookhey "Tax dispute systems design" (2013) 11 EJTR 79.

³ Binh Tran-Nam and Michael Walpole "Independent Tax Dispute Resolution and Social Justice in Australia" (2012) 35 UNSWLJ 470 at 477.

⁴ At 472.

⁵ At 472-473.

disagreement with the provisions of a tax treaty.⁶ For example, a taxpayer may believe that the actions of the taxpayer's country, a treaty country, or both, will or may result in taxation that is not in accordance with a particular tax treaty and thus, may request competent authority assistance. Consequently, the dispute is generally dealt with between the competent authorities of the two treaty countries. The taxpayer is usually not permitted to participate in any formal meetings between the competent authorities. Hence, these tax disputes are "intergovernmental disputes between the treaty nations rather than disputes between the [revenue authority] and taxpayers."⁷ As this research is confined to tax disputes occurring between the revenue authority and taxpayers, the abovementioned types of tax disputes are excluded from the scope of this study.

Tran-Nam and Walpole further state that "tax disputes are said to take place when the taxpayer takes a contrary view to that of the tax administration, and decides to take some action regarding this disagreement."⁸ Thus, also excluded from the definition of tax disputes in this study, are those cases in which taxpayers disagree with tax administrators but do not take any action apart from complying with the decisions of tax administrators. This more restrictive definition is mainly due to the fact that those taxpayers who disagree but do nothing about it are unobservable to independent researchers.⁹

In addition, it is necessary to distinguish tax disputes from taxpayer complaints. A complaint can be defined as "an expression of dissatisfaction or concern about goods, services, actions or inaction that is made by a complainant (often a consumer) or by another person on their behalf."¹⁰ Furthermore, "a complaint may not involve any disagreement."¹¹ In the context of tax administration, complaints can be about: undue delays; unclear or misleading information; staff behaviour; or mistakes, which could result from misunderstanding, omissions or oversights.¹² Generally, complaints cannot be filed by taxpayers for substantive tax issues, for example, relating to how much tax is owed or about laws that the taxpayer thinks are wrong.¹³ These issues are usually dealt with through a tax administration's review and appeal procedures. Whilst stated in the context of tax dispute resolution in New Zealand (NZ), but nevertheless applicable to tax dispute resolution generally, the Organisational Review

⁶ United States General Accounting Office *IRS Initiatives to Resolve Disputes Over Tax Liabilities* (Washington DC, May 1997) at 26.

⁷ At 26.

⁸ Tran-Nam and Walpole, above n 3, at 477.

⁹ At 477.

¹⁰ Tania Sourdin *Alternative Dispute Resolution* (4th ed, Thomson Reuters, Sydney, 2012) at 133.

¹¹ At 8.

¹² Canada Revenue Agency "Make a service complaint?" (12 April 2016) <<http://www.cra-arc.gc.ca/gncy/cmpltndspts/srvccmplnts/menu-eng.html>> (last accessed 7 November 2016).

¹³ Canada Revenue Agency, above n 12.

Committee of the Inland Revenue Department (the Richardson Committee) also drew a distinction between “clarification or confirmation issues” and “process problems” (complaints), which do not constitute a dispute, and “a ‘tax dispute’ [which] occurs when the Commissioner and taxpayer do not agree on the facts and/or interpretation of tax law on which an assessment has been based.”¹⁴ Against this background, the complaint handling procedures of the revenue authorities (including any external recourse to independent ombudsmen or equivalent) of the selected jurisdictions in this study, are excluded from the scope of this research.

The income tax systems pertaining to the jurisdictions selected for this study all currently operate on a self-assessment basis for income tax. That is, certain taxpayers are responsible for calculating their own tax obligations, filing their tax returns on a timely basis and paying the correct amount of tax to the tax authority. Self-assessment is based on the idea of voluntary taxpayer compliance. Although, to make it easier for taxpayers to meet their self-assessment obligations, many Organisation for Economic Co-operation and Development (OECD) countries, including Australia and the United Kingdom (UK), now pre-populate income tax returns with certain information held by the revenue authority or reliable third parties.¹⁵ However, taxpayers still remain responsible for the ensuring accuracy of their assessment. Nevertheless, taxpayer audits are an important tool in tax enforcement under self-assessment regimes and in most jurisdictions featuring self-assessment regimes tax disputes principally arise through taxpayer audits.¹⁶ It follows that such tax disputes can generally be classified as post-filing tax disputes and are accordingly dealt with using post-filing dispute resolution processes (as distinct from pre-filing processes¹⁷ and advance pricing agreements (APAs)).¹⁸ Thus, the scope of this study is limited to post-filing tax disputes and the tax dispute resolution processes (including ADR processes) examined are limited to post-filing processes.

¹⁴ Organisational Review Committee *Organisational Review of the Inland Revenue Department Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* (Wellington, 1994) at [10.1], [10.9].

¹⁵ Inland Revenue *Making Tax Simpler – Towards a New Tax Administration Act: A Government Discussion Document* (November 2015) at 57. In 2015, Inland Revenue also proposed the pre-population of individual income tax returns in NZ: at 55-65.

¹⁶ Tran-Nam and Walpole, above n 3, at 478; Suzette Chapple “Income Tax Dispute Resolution: Can we Learn from Other Jurisdictions?” (1999) 2 JAT 312 at 318; Bentley *Taxpayers’ Rights: Theory, Origin and Implementation*, above n 1, at 174.

¹⁷ Pre-filing dispute resolution processes enable taxpayers to resolve issues and disputes with tax authorities prior to filing a tax return, thus, giving taxpayers certainty that, once an issue has been resolved, the position will not be challenged by the tax authority during the audit process: EY *Tax Dispute Resolution: A New Chapter Emerges – Tax Administration Without Borders* (2010) at 11.

¹⁸ APAs specifically cover transfer pricing issues and allow taxpayers and tax authorities to agree on an appropriate transfer pricing methodology in advance of a return being filed: at 9.

2.2.2 Alternative dispute resolution in the context of tax dispute resolution

Post-filing tax disputes between taxpayers and the tax authority can be resolved by various methods including “negotiating with the other party directly” or “asking a court or tribunal to make a decision.”¹⁹ Guidance in the UK notes that the vast majority of tax disputes are settled by out of court agreement following discussions between the tax authority and the taxpayer.²⁰ Relatively few disputes are referred to the Court for resolution.²¹ Furthermore, increasingly parties involved in tax disputes are encouraged or required to make genuine efforts to resolve tax disputes via ADR before these disputes can be settled by judicial determination. These obligations with respect to ADR can include an initial obligation or requirement of the revenue authority to implement ADR processes²² and/or an on-going obligation to use ADR in managing and resolving tax disputes.²³

The dispute resolution literature further provides the following reasons contributing towards the increase in popularity of ADR in resolving disputes generally:²⁴

- Overloaded court dockets.
- Increasing cost and decreasing satisfaction with litigation.
- Societal movement toward more natural and humane methods of dispute resolution.
- Desire to empower disputants to participate in resolving their own disputes.
- Increasing interest in flexible dispute resolution.
- Interest in confidentiality and avoidance of publicity.

The term “Alternative Dispute Resolution” or “ADR” has traditionally been used to refer to dispute resolution processes that are “alternative” to traditional court proceedings.²⁵ However,

¹⁹ Australian Taxation Office “ATO plain English guide to alternative dispute resolution” (1 June 2015) <<http://www.ato.gov.au/About-ATO/About-us/In-detail/Key-documents/ATO-plain-English-guide-to-alternative-dispute-resolution/>> (last accessed 7 November 2016).

²⁰ HM Revenue and Customs *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in Large or Complex Cases* (April 2012) at 3.

²¹ At 3.

²² For example, in the United States (US), the Administrative Dispute Resolution Act of 1990 and the Internal Revenue Service Restructuring and Reform Act of 1998 directed that the Internal Revenue Service (IRS) implement ADR procedures in their administrative dispute process.

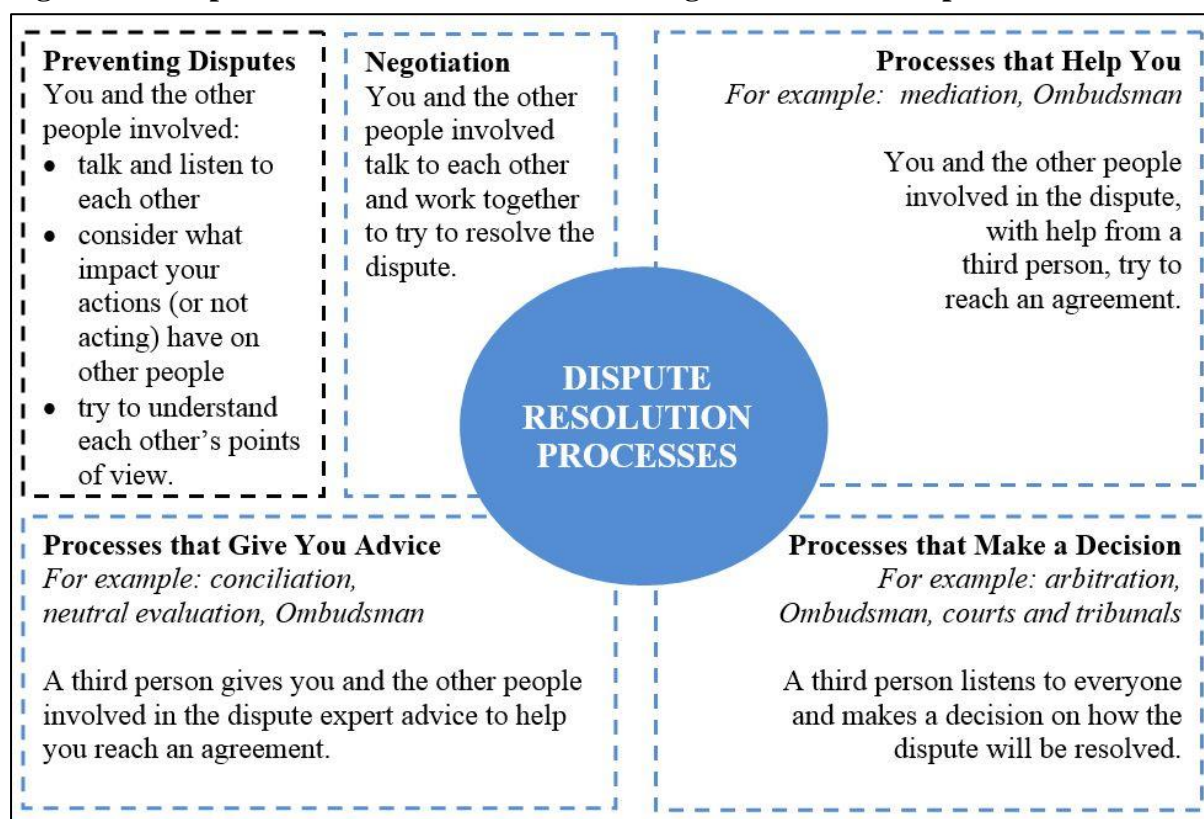
²³ For example, in Australia, the Australian Taxation Office (ATO) is obliged to consider ADR as a means of resolving tax disputes under various provisions contained in the Legal Services Directions 2005 (Cth) and the Civil Disputes Resolution Act 2011 (Cth). In the UK, HM Revenue and Customs (HMRC) is encouraged to use ADR through the UK Government-wide Dispute Resolution Commitment. In NZ, unlike in the other three jurisdictions in this study, there is currently no requirement or obligation for Inland Revenue to implement ADR processes or any ongoing requirement or obligation to utilise ADR in managing or resolving tax disputes.

²⁴ Cathy A Costantino and Christina S Merchant *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, San Francisco, 1996) at 35-37.

²⁵ Sourdin, above n 10, at 2.

ADR has also been used as an acronym for “appropriate”, “assisted” or “additional” dispute resolution processes.²⁶ It has been noted that “it seems ludicrous to speak of ‘alternative dispute resolution’ when in fact means other than litigation have long been the primary means of resolving disputes.”²⁷ Current anecdotal evidence from (A)DR practitioners purports that the term ‘dispute resolution’ or ‘DR’ is now the preferred term amongst the profession. However, in this study the term ‘ADR’ will be used given that in the researcher’s view, in the context of tax dispute resolution, ADR processes presently remain as ‘alternative’ dispute resolution processes.

Figure 2.1: Dispute Resolution Processes to Manage or Resolve a Dispute in Australia²⁸



²⁶ At 2; National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016) at 4.

²⁷ Family Court of Australia *Response of the Family Court of Australia to the Attorney-General's Department Paper on Primary Dispute Resolution Services in Family Law* (Sydney, 1997) at 7.

²⁸ Reproduced from the Australian National Alternative Dispute Resolution Advisory Council *Your Guide to Dispute Resolution* (Barton, 2012) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016) at 6.

The National Alternative Dispute Resolution Advisory Council (NADRAC)²⁹ describes ADR as “an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.”³⁰ While the NADRAC does not specifically define the word ‘assists’, Sourdin notes that, in the context of describing ADR, it can be taken to mean that an impartial third party (often referred to as an impartial ADR practitioner) “either assists the parties in a dispute or conflict to reach a decision by agreement, or makes a recommendation or a decision that may be binding or non-binding on the parties.”³¹ Referring to Figure 2.1, which illustrates dispute resolution processes that can be used to manage or resolve a dispute, the NADRAC definition includes “Processes that Help You”, “Processes that Give You Advice” and “Processes that Make a Decision” (excluding court and tribunal determinations).

However, there are other definitions for ADR that exist which are narrower in scope. For example, the Centre for Effective Dispute Resolution (CEDR) defines ADR as:³²

A body of dispute resolution techniques which avoid the inflexibility of litigation and arbitration, and instead focus on enabling parties to achieve a better or similar result, with the minimum of direct and indirect cost.

Along similar lines, ADR processes are defined in section 3(1) of the Administrative Appeals Tribunal Act 1975 (Cth) as:

[P]rocedures and services for the resolution of disputes, and includes:

- (a) conferencing; and
- (b) mediation; and
- (c) neutral evaluation; and
- (d) case appraisal; and
- (e) conciliation; and
- (f) procedures or services specified in the regulations;

but does not include:

- (g) arbitration; or
- (h) court procedures or services.

²⁹ The NADRAC was established in 1995 and was an independent advisory council to the Australian Attorney-General on dispute resolution. However, it was closed following the Australian Government's announcement on 8 November 2013 to abolish or rationalise a number of non-statutory bodies. For further information on the NADRAC, see National Alternative Dispute Resolution Advisory Council *Alternative Dispute Resolution in the Civil Justice System: Issues Paper* (Barton, 2009) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016) at 1, [1.1]-[1.2].

³⁰ National Alternative Dispute Resolution Advisory Council, above n 26, at 4.

³¹ Sourdin, above n 10, at 3.

³² Centre for Effective Dispute Resolution “Glossary of terms” <http://www.cedr.com/about_us/library/glossary.php> (last accessed 7 November 2016).

The above definitions generally exclude arbitration (as well as judicial determination) from ADR. However, for the purposes of this study, in order to encompass a wide range of processes, the NADRAC's definition of ADR has been adopted.³³ The NADRAC definition includes ADR processes used within or outside courts and tribunals.

It should additionally be noted that, in the context of this study, 'alternative' dispute resolution processes or methods that may be utilised by revenue authorities which do not involve an impartial third party assisting those in a dispute to resolve the issues between them, generally do not fall within the NADRAC definition of ADR outlined above.³⁴ Thus, an agreement between a revenue authority and certain qualifying taxpayers to advance the resolution of issues arising from an audit of the taxpayer from one or more tax periods, to other tax periods ending prior to the date of that agreement, would not fall within the definition of ADR.³⁵

The NADRAC state that the main types of ADR include mediation, arbitration and conciliation.³⁶ These three types of ADR are described below:³⁷

- Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.³⁸
- Arbitration is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.³⁹

³³ The NADRAC definition of ADR is used by various bodies and organisations including the Australian Disputes Centre (ADC), the Mediators Standards Board (MSB), the Law Council of Australia and the ATO.

³⁴ However, there are exceptions to this in the general context of ADR. For example, collaborative practice is a form of ADR which involves a team approach and does not ordinarily involve a third party who is an impartial facilitator: Sourdin, above n 10, at 3.

³⁵ See, for example, the IRS's Accelerated Issue Resolution (AIR) program: Internal Revenue Service Rev. Proc. 94-67, 1994-2 C.B. 800. See also, section 1.4.3.2 of Appendix 1.4 of this thesis.

³⁶ National Alternative Dispute Resolution Advisory Council, above n 29, at 3, [2.5].

³⁷ A glossary of definitions for other types of ADR processes is provided in the "Glossary of Dispute Resolution Terms", at page xii of this thesis. See also, National Alternative Dispute Resolution Advisory Council, above n 26.

³⁸ National Alternative Dispute Resolution Advisory Council, above n 26, at 9.

³⁹ At 4.

- Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.⁴⁰

However, within the different forms of ADR, there can be considerable variation in process features and application. For example, various ADR commentators have discussed the different variations that exist in respect of mediation models or approaches. Boulle, Goldblatt and Green suggest four separate mediation models: settlement, facilitative, transformative and evaluative.⁴¹ In each model the objective is different. In settlement mediation, the objective is to reach a compromise. In facilitative mediation, the objective is to promote negotiation in terms of underlying needs and interests rather than legal rights or obligations. In the transformative model, underlying causes of behaviour may be considered. In evaluative mediation the primary focus is on settlement according to legal rights. The NADRAC description of mediation above assumes that a facilitative model of mediation will operate.⁴² However, the mediation models are not distinct alternatives to one another. A mediation may commence in one mode and then adopt the characteristics of another model (for example, it may commence in the facilitative mode, but later develop into the settlement or evaluative model).⁴³

The NADRAC additionally observes that “there is little consistency in how ADR terms are used. Even when mentioned in ... legislation, ADR processes are not clearly defined.”⁴⁴ Sourdin notes that definitional variations “can also indicate where reforms can occur or have taken place because of the evolving nature of many ADR processes.”⁴⁵ Furthermore, the NADRAC states that “different [ADR] terminology has evolved in different sectors and social groups” and “the meaning and implications of particular words depend largely on the context in which they are used.”⁴⁶ The variations in ADR process definitions mainly relate to the

⁴⁰ At 5.

⁴¹ Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation: Principles, Process and Practice* (2nd ed, LexisNexis, Wellington, 2008) at 35.

⁴² National Alternative Dispute Resolution Advisory Council, above n 26, at 3.

⁴³ Boulle, Goldblatt and Green, above n 41, at 35.

⁴⁴ National Alternative Dispute Resolution Advisory Council, above n 29, at 6, [2.15].

⁴⁵ Sourdin, above n 10, at 5.

⁴⁶ National Alternative Dispute Resolution Advisory Council, above n 26, at 1.

position and role of the dispute resolution practitioner.⁴⁷ For example, the most common variation in descriptions of mediation relates to whether or not a practitioner is able to provide a view as to the likely outcome should a dispute proceed to litigation. In most instances, a process that has an advisory component (in relation to the content of the dispute or the outcome of its resolution) would not be regarded as mediation.⁴⁸ Accordingly, the NADRAC considers that:⁴⁹

... ‘mediation’ is a purely facilitative process, whereas ‘conciliation’ may comprise a mixture of different processes including facilitation and advice ... the term ‘mediation’ should be used where the practitioner has no advisory role on the content of the dispute and the term ‘conciliation’ where the practitioner does have such a role.

In the context of tax dispute resolution, a further ADR process which is of relevance is facilitation (also referred to as “facilitated discussion”).⁵⁰ Facilitation in the tax dispute resolution context is generally a process where a trained facilitator assists the parties to negotiate their dispute. The facilitator “helps the parties identify disputed issues, develop options, consider alternatives, and attempt to reach an agreement.”⁵¹ The facilitator does not establish facts, take sides, give advice, make a decision or decide who is “right or wrong.”⁵² The facilitator merely guides the parties through the process and assists them to ensure that there are open lines of clear communication, and messages are correctly received. The facilitator is typically a revenue authority member of staff who has been trained in mediation techniques.⁵³ Thus, in the tax dispute resolution context, the main difference between facilitated discussions and mediation is that in the former, “the people brought in to help the disputing parties are not independent of the disputing parties, but will work neutrally.”⁵⁴

More recently tax authorities, such as the ATO and HMRC, have adopted a broader classification for different types of ADR that may be used in tax dispute resolution. The ATO outline that ADR processes can generally be classified as facilitative, advisory or determinative, and can be expected to have the following features:⁵⁵

⁴⁷ Sourdin, above n 10, at 5.

⁴⁸ At 5. See also, Robert Fisher “When should mediators bite their tongue?” (2010) 150 NZLawyer 18 at 18.

⁴⁹ National Alternative Dispute Resolution Advisory Council, above n 26, at 3.

⁵⁰ HM Revenue and Customs, above n 20, at 5. For example, Inland Revenue, the ATO and HMRC all have various forms of facilitation programs. For further details on these programs, see section 1.1.2.1 of Appendix 1.1; section 1.2.2.2 of Appendix 1.2; and section 1.3.2 of Appendix 1.3 of this thesis, respectively.

⁵¹ Australian Taxation Office, above n 19.

⁵² Australian Taxation Office, above n 19.

⁵³ HM Revenue and Customs, above n 20, at 5.

⁵⁴ At 5.

⁵⁵ Australian Taxation Office, above n 19.

- In facilitative processes, an ADR practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole of the dispute. In facilitative processes the ADR practitioner manages the process but does not provide advice or make a decision on the result of the dispute. Mediation and facilitation are types of facilitative processes.
- In advisory processes, an ADR practitioner considers and appraises the dispute and provides advice on some or all of the facts of the dispute, the law, and possible or desirable outcomes. The ADR practitioner manages the process and provides professional advice on the matters in dispute or possible outcomes or both, but does not decide the result of the dispute. Neutral evaluation and case appraisal are examples of advisory processes.
- In determinative processes, an ADR practitioner evaluates the dispute (which may include the hearing of formal evidence from the participants) and makes a determination. Arbitration and expert determination are examples of determinative processes.

In addition, there are blended dispute resolution processes in which the ADR practitioner plays multiple roles. For example, in conciliation and conferencing, the ADR practitioner may facilitate discussions as well as provide advice on the merits of the dispute.⁵⁶ While the above classification of facilitative, advisory and determinative ADR processes provides a different classification to Ury, Brett and Goldberg's categories of interests, rights and power-based processes (see chapter 1, section 1.1 of this thesis), it can be seen that facilitative ADR processes broadly align with interest-based dispute resolution procedures. Furthermore, the ADR processes utilised in the context of the tax dispute resolution systems of tax authorities such as the ATO and HMRC largely relate to "collaborative dispute resolution" processes such as mediation and facilitated discussion.⁵⁷ The ATO and HMRC outline that determinative ADR processes, such as arbitration, are:⁵⁸

[G]enerally not appropriate for tax disputes because it can incur similar costs and delays as litigation, potentially conflicts with the statutory responsibilities of the Commissioner as decision-maker, and can lack the openness and transparency of court or tribunal decisions.

⁵⁶ National Alternative Dispute Resolution Advisory Council, above n 26, at 5.

⁵⁷ HM Revenue and Customs, above n 20, at 3.

⁵⁸ Australian Taxation Office, above n 19. See also, HM Revenue and Customs, above n 20, at 3.

The (lack of) appropriateness of arbitration in the context of tax dispute resolution is further evident in the recent elimination by the IRS of its Appeals Arbitration program, effective from 21 September 2015, due to the “general lack of demand for arbitration and the fact that its use as a tool to settle disputes without litigation has not proven successful.”⁵⁹

2.3 Background to Dispute Systems Design

DSD is a phrase coined by Ury, Brett and Goldberg to reflect an organisation’s effort to identify and improve the way it manages conflict.⁶⁰ Bingham and Nabatchi state that “[m]ost research in conflict management has been process-orientated, focusing on the methods, costs and benefits of different alternative dispute resolution (ADR) procedures.”⁶¹ In this respect, research in the field has been largely conducted at the micro-level.⁶² However, emerging research is focusing on a more macro-level examination of conflict management in organisations. Instead of examining dispute resolution processes, researchers have begun to look at dispute resolution systems: “the complete composition, arrangement, and structure of dispute resolution processes in organizations.”⁶³ The examination of dispute resolution processes as part of a more complete system has led to the concept of DSD, “the conscious, purposeful, and deliberate planning of conflict management systems within an organization.”⁶⁴

The notion of DSD arose from research on grievance mediation in the unionised coal industry during the 1980s, a period when wildcat strikes and consequent disruption in production plagued the industry.⁶⁵ Grievance mediation is an ADR process in which labour and management use mediation before binding arbitration.⁶⁶ In a coal-mining experiment, Ury mediated disputes shortly after they arose, rather than waiting for the eve of an arbitration hearing.⁶⁷ Researchers found several positive effects of grievance mediation in the industry,

⁵⁹ Internal Revenue Service Rev. Proc. 2015-44, 2015-38 I.R.B. 354 at [3.0]. For further details on the IRS Appeals Arbitration program see also, section 1.4.2.5 of Appendix 1.4 of this thesis.

⁶⁰ William L Ury, Jeanne M Brett and Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, Cambridge, MA, first published 1988, 1993 ed).

⁶¹ Lisa B Bingham and Tina Nabatchi “Dispute System Design in Organizations” in William J Pammer and Jerri Killian (eds) *Handbook of Conflict Management* (Marcel Dekker, New York, 2003) 105 at 105-106.

⁶² At 106.

⁶³ At 106.

⁶⁴ At 106.

⁶⁵ Ury, Brett and Goldberg, above n 60, at xvi-xvii.

⁶⁶ Peter Feuille “Why Does Grievance Mediation Resolve Grievances?” (1992) 8 Negotiation J 131; Peter Feuille and Deborah M Kolb “Waiting in the Wings: Mediation’s Role in Grievance Resolution” (1994) 10 Negotiation J 249; Peter Feuille “Grievance Mediation” in Adrienne E Eaton and Jeffrey H Keefe (eds) *Employment Dispute Resolution and Worker Rights in the Changing Workplace* (Industrial Relations Research Association, Champaign, 1999) 187.

⁶⁷ Stephen B Goldberg “The Mediation of Grievances under a Collective Bargaining Contract: An Alternative to Arbitration” (1982) 77 Nw U L Rev 270.

including high settlement rates, a decline in wildcat strikes, and high participant satisfaction with the experiment.⁶⁸

These findings suggested that mediation was a better process than strikes as a means of dispute resolution, and led the researchers to conjecture about how organisations could more effectively manage conflict. Researchers identified three basic approaches to resolving conflict: power, rights and interests.⁶⁹ As noted in chapter 1, section 1.1 of this thesis, power represents the ability to impose on others decisions about the outcomes of disputes and can be exercised at the individual, group, or organisational levels. Examples of power-based approaches to organisational dispute resolution include strikes, lockouts, plant closings, sub-contracting, or work relocation, and reductions in force. Rights are fixed rules or principles based on statutes, case law, contracts, and collective-bargaining agreements. Rights-based approaches to dispute resolution help determine whether legal or contractual rights have been violated. Examples of rights-based approaches to organisational dispute resolution include adjudication of statutory rights by administrative agencies or courts, binding or non-binding arbitration, and neutral evaluation. Interests are the needs, concerns, and desires of individuals or groups. Interest-based approaches use problem-solving techniques to address the perceived needs of the disputing parties. Examples of interest-based approaches to organisational dispute resolution include negotiation, facilitation and mediation.

In the context of the coal-mining experiment, grievance mediation, an interest-based approach, was found to be more effective than wildcat strikes, a power-based approach. This prompted the researchers to posit that an organisation could improve its conflict management capacity by shifting its dispute resolution system, over time, from one dominated by power and rights-based approaches to one dominated by interest-based approaches.⁷⁰ In general, interest-based approaches were believed to be cheaper and more effective than rights-based approaches, which were thought to be cheaper and more effective than power-based approaches.⁷¹ The theory was that using interest-based approaches would result in cost-effective, satisfying, longer-term, and more sustainable solutions to ongoing or recurring problems, particularly when those problems occurred as part of an ongoing relationship such as those in an employment setting. From this emerged the idea of DSD, the notion that organisations could deliberately and purposefully select dispute resolution approaches and processes for more effective conflict management.

⁶⁸ Stephen B Goldberg and Jeanne M Brett “An experiment in the mediation of grievances” (1983) 106(3) Monthly Lab Rev 23.

⁶⁹ Ury, Brett and Goldberg, above n 60, at 4-9.

⁷⁰ Ury, Brett and Goldberg, above n 60; Roger Fisher, William L Ury and Bruce Patton *Getting to Yes: Negotiating Agreement Without Giving In* (3rd ed, Penguin, New York, 2011).

⁷¹ Ury, Brett and Goldberg, above n 60, at 15.

Notwithstanding the potential benefits of interests-based approaches, it may not be possible or desirable to resolve all disputes by reconciling interests.⁷² Parties may be unwilling or unable to utilise interests-based procedures including negotiation and mediation. Rights or power-based approaches may be necessary in the following circumstances:⁷³

- (1) To bring recalcitrant parties to the negotiating table. Interest-based negotiation cannot occur in some cases unless rights or power-based approaches are first employed;
- (2) To clarify the boundaries of the parties' rights within which a negotiated resolution of a dispute can be sought. The parties' perceptions of who is right may be so divergent that a rights-based procedure is necessary to establish a bargaining range within which to negotiate;
- (3) As a last resort when parties' interests are so opposed that agreement is not possible;
- (4) In cases where there are significant public policy questions involved, a rights-based approach (for example, litigation) may be more desirable from a social perspective than interest-based approaches.

However, rights and power-based procedures are often used where they are not necessary and “a procedure that should be the last resort too often becomes the first resort.”⁷⁴ The goal therefore, is a dispute resolution system where most disputes are resolved through reconciling interests, some through determining who is right, and the fewest through determining who is more powerful (see pyramid on the right in Figure 2.2). By contrast, a distressed system is where few disputes are resolved through reconciling interests, while many are resolved through determining rights and power (see inverted pyramid on the left in Figure 2.2). The challenge for systems designers is to turn the pyramid the right side up. It is to design a system that promotes the reconciling of interests but also provides low-cost ways to determine rights or power for those disputes that cannot or should not be resolved by focusing on interests alone.⁷⁵

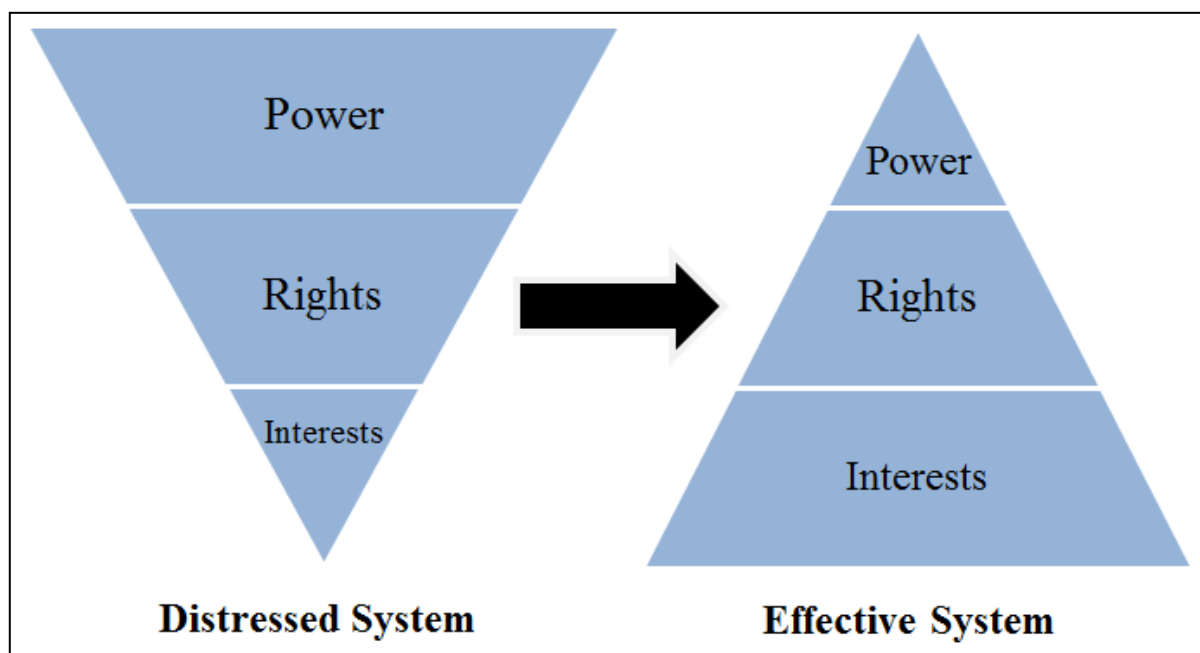
⁷² At 18.

⁷³ At 16-17.

⁷⁴ At 18.

⁷⁵ At 18.

Figure 2.2: Moving from a Distressed to an Effective Dispute Resolution System⁷⁶



Other DSD practitioners have since expanded on Ury, Brett and Goldberg’s tripartite distinction of power, rights and interest-based approaches.⁷⁷ Lynch states that:⁷⁸

Organizations faced with conflict can resort to different approaches used alone or in combination for dealing with that conflict, including: a “power-based” approach; a “rights-based” approach; an “interest-based” approach; and a “systems approach.”

A systems approach “includes all the options for dispute resolution available in the three other phases, and goes significantly further in its approach to conflict and its management.”⁷⁹ A systems approach is different from the first three approaches because, “in addition to dispute

⁷⁶ At 19, Figure 1.

⁷⁷ See Costantino and Merchant, above n 24; Mary P Rowe “Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?” in Sandra Gleason (ed) *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (Michigan State University Press, East Lansing, 1997) 79; Jennifer F Lynch *CCRA: Contemporary Conflict Resolution Approaches* (Canada Customs and Revenue Agency, Ottawa, 1998); Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998); Society of Professionals in Dispute Resolution *Designing Integrated Conflict Management Systems: Guidelines for Designers and Decision Makers in Organizations* (Washington DC, 2001).

⁷⁸ Jennifer F Lynch “Integrated Conflict Management Programs Emerge as an Organization Development Strategy” (2003) 21 *Alt High Cost Litig* 99 at 99.

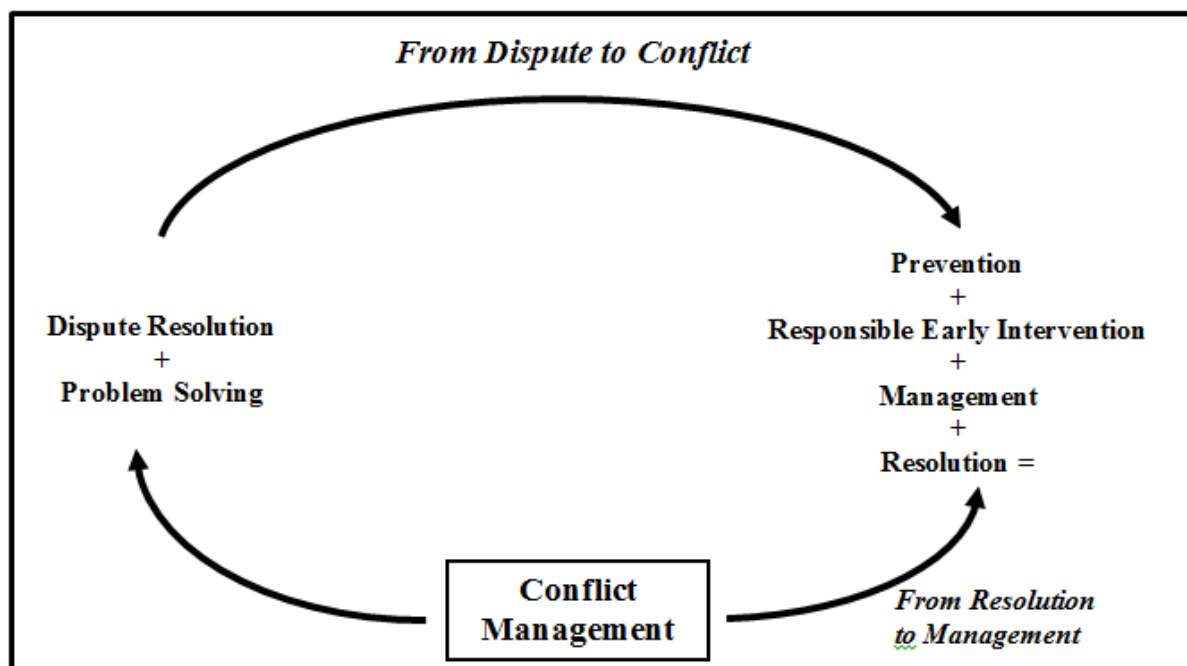
⁷⁹ Jennifer F Lynch “Beyond ADR: A Systems Approach to Conflict Management” (2001) 17 *Negotiation J* 207 at 208.

resolution techniques, it has features that focus on preventing unnecessary conflict and, when conflict arises, on managing it.”⁸⁰ Lynch further states that:⁸¹

When organizations go beyond ad hoc, case-by-case dispute resolution and turn their focus to systematically integrating all of these approaches [power, rights and interests-based] into their day-to-day business, plus add processes that shift their conflict culture toward prevention, the new phenomenon is called an “Integrated Conflict Management System.”

Of note is the shift in terminology. That is, it is not termed “integrated *dispute resolution* system”, but rather “integrated *conflict management* system.”⁸² Lynch states that “conflict” is a word that includes disputes but also has a broader connotation, including such things as relationship strains and workplace stresses that have not yet surfaced as a dispute.⁸³ “Management” of conflict includes resolution plus such other initiatives as prevention and containment.⁸⁴ Thus, “the term ‘conflict management’ includes dispute resolution and goes well beyond it” (as illustrated in Figure 2.3).⁸⁵

Figure 2.3: Terminology Shift from Dispute Resolution to Conflict Management⁸⁶



⁸⁰ Lynch, above n 78, at 100.

⁸¹ At 99.

⁸² Lynch, above n 79, at 208 (emphasis in original).

⁸³ At 208

⁸⁴ At 208.

⁸⁵ At 208.

⁸⁶ Lynch, above n 78, at 99, Figure 1.

Accordingly, when discussing dispute resolution systems design, Tully notes that the expression “conflict management systems design” is preferred by some authors for the reason that the words “conflict” and “management” are of wider scope than “dispute” and “resolution”.⁸⁷ Costantino additionally states that the nomenclature “conflict management systems design” is used to “emphasise the importance of managing conflict, preventing disputes, and accepting conflict as inevitable.”⁸⁸ This is in contrast to “dispute systems design” which tends to “focus more exclusively on intervention once the conflict has escalated into a dispute.”⁸⁹ Smith and Martinez also “favour the term ‘dispute’ for conflicts that have evolved into defined, focused disagreements, often framed in legal terms, with ‘conflict’ encompassing a broader category.”⁹⁰ However, they further state that they use the term “Dispute Systems Design” in recognition that it has “become the term of art” and because a more inclusive term, such as “Conflict and Dispute Prevention, Management and Resolution Systems Design” would be cumbersome.⁹¹ For this reason, notwithstanding the differences in the terms highlighted above, ‘dispute systems design’ will generally be used interchangeably with ‘conflict management systems design’ in this study.

2.4 Stages of Dispute Systems Design

The DSD literature⁹² indicates that DSD can generally be conceptualised as a series of stages:

- (a) organisational diagnosis;
- (b) system design;
- (c) implementation; and
- (d) exit, evaluation, and diffusion.

Tully notes that the tasks undertaken during the various stages of DSD cannot be neatly separated in time or order and variations exist between authors on such matters as terminology and the number of stages.⁹³ However, the sequence of stages outlined above is generally followed in designing and implementing dispute resolution systems. Moreover, the process of

⁸⁷ *The Laws of Australia* (2013) vol 13(6) Dispute Systems Design at [13.6.10].

⁸⁸ Cathy A Costantino “Second Generational Organizational Conflict Management Systems Design: A Practitioner’s Perspective on Emerging Issues” (2009) 14 Harv Negot L Rev 81.

⁸⁹ At 81.

⁹⁰ Stephanie Smith and Janet Martinez “An Analytic Framework for Dispute Systems Design” (2009) 14 Harv Negot L Rev 123 at 126.

⁹¹ At 126.

⁹² See for example, Ury, Brett and Goldberg, above n 60, at 65; Costantino and Merchant, above n 24, at 46; John Lande “Principles for Policymaking About Collaborative Law and Other ADR Processes” (2007) 22 Ohio St J on Disp Resol 619 at 630; Tina Nabatchi and Lisa B Bingham “From Postal to Peaceful: Dispute Systems Design in the USPS REDRESS Program” (2010) 30 Rev Pub Personnel Admin 211 at 215.

⁹³ *The Laws of Australia*, above n 87, at [13.6.370].

DSD is cyclical. The design process is not a one-off event. The information obtained through system evaluation may suggest further systems change. Many factors assessed at the outset of the design effort may evolve over time. In this way, systems respond to and reflect environmental conditions and the evolving requirements of both organisations and system users.⁹⁴

The relevant area of interest in this study, DSD principles, falls within the systems design stage of DSD. This stage follows the organisational diagnosis stage in which designers acquire information about the existing dispute resolution system (if one exists), the disputes which the system will handle, organisational and user needs, and the system changes which can be both afforded and tolerated. Diagnosis also reveals why particular procedures are being used. It explores the motivations that lie behind the use of procedures and the benefits that interest-based procedures must match if they are to take hold.⁹⁵

The DSD process also initially involves the entry by a designer into the organisation and an acceptance by the organisation to undertake the design intervention thereby formulated.⁹⁶ Conbere states that DSD is “an area of professional practice that is not currently identified with a single profession.”⁹⁷ Dispute system designers include lawyers, mediators, organisational psychologists, human resource developers, economists and others who work with conflict management in organisations.⁹⁸ Costantino and Merchant provide a number of reasons for why it may be useful for organisations to employ the services of an experienced external consultant or designer:⁹⁹

- Internal organisational participants often listen more attentively to and accord more creditability to the advice of an “outside expert”;
- External designers bring expertise and experience from their work with other organisations to the technical and practical aspect of design work and may be viewed as less threatening;
- The objectivity and independence of the external designer may facilitate the surfacing of sensitive organisational issues without the same peer pressures and cultural and career limitations that internal dispute resolution specialists may have; and

⁹⁴ At [13.6.900].

⁹⁵ Ury, Brett and Goldberg, above n 60, at 40.

⁹⁶ *The Laws of Australia*, above n 87, at [13.6.380].

⁹⁷ John P Conbere “Theory Building for Conflict Management System Design” (2001) 19 Conflict Resol Q 215 at 226.

⁹⁸ At 226.

⁹⁹ Costantino and Merchant, above n 24, at 75.

- External designers may add a “big picture” perspective to the various components of the design effort.

In addition, Tully states that stakeholders¹⁰⁰ should, where possible, be involved in the design process as stakeholder participation within the design process can build system creditability.¹⁰¹ Designers must commit to consulting stakeholders as much as possible, obtain information from them with respect to problems and needs and seek their input into design alternatives.¹⁰² Designers may need to provide a large number of stakeholders with a structured means for providing input into the design process. There are several participative processes which can be used by designers in order to overcome the difficulties of consulting with large numbers of interested parties, including: design committees, partnership councils and focus groups.¹⁰³ Designers may also mediate between various interested parties to negotiate ideas for change and obtain agreement on potential design alternatives.¹⁰⁴

The process of designing the system is guided by a number of general design principles which emphasise the inclusion of interest-based processes. As stated earlier, these principles emanate from the six DSD principles proposed by Ury Brett and Goldberg. Nabatchi and Bingham claim that systems that follow these general design principles are thought to be more likely to produce positive dispute outcomes and improve the organisation’s overall capacity for effective conflict management.¹⁰⁵ However, as noted in chapter 1, section 1.2.2 of this thesis, these general DSD principles are “guidelines only and should not be elevated to the status of rules.”¹⁰⁶ Wolski further states that: “Although the term ‘principles’ is used to describe them, they are not immutable.”¹⁰⁷ The need to design a dispute resolution system which satisfies the requirements of a particular organisation or relationship must remain a paramount consideration.

The implementation stage of the DSD process involves “motivating the parties to use the new procedures and helping them develop the skills to do so.”¹⁰⁸ Motivating the disputants to use the new procedures can be done in several ways, including: by demonstrating the procedures,

¹⁰⁰ Stakeholders can include the immediate parties in conflict, individuals or entities subsidiary to or constituents of those parties, or others directly or indirectly affected by the dispute’s outcome: Smith and Martinez, above n 90, at 131.

¹⁰¹ *The Laws of Australia*, above n 87, at [13.6.400].

¹⁰² At [13.6.400].

¹⁰³ At [13.6.400].

¹⁰⁴ At [13.6.400]; Ury, Brett and Goldberg, above n 60, at 69-71.

¹⁰⁵ Nabatchi and Bingham, above n 92, at 215.

¹⁰⁶ *The Laws of Australia*, above n 87, at [13.6.510].

¹⁰⁷ Bobette Wolski “The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective” (1998) 10(1) Bond LR 1 at 18.

¹⁰⁸ Ury, Brett and Goldberg, above n 60, at 75.

using leaders as examples, using peers as proponents, setting goals, providing incentives, and publicising early successes.¹⁰⁹ Ury, Brett and Goldberg further state that one of the designer's most important implementation tasks is helping the disputants to acquire the skills to use the new procedures effectively. As the new procedures will most often be interest-based, this typically involves training and coaching disputants in negotiation and mediation skills.¹¹⁰

The purpose of the evaluation stage is to determine whether the changes to the dispute resolution system are working as intended. Evaluation of a system may be conducted by the designer, an independent third party or group, or a representative task force.¹¹¹ Diffusion is usually an optional step in the DSD process.¹¹² However, where diffusion is applicable, the most common form is replication – the transfer of a procedure from one site to another.¹¹³ Finally, external specialists must ultimately exit the system to enable the system and its users to operate independently (of their services).

As the focus of this study is on the DSD principles within the systems design phase of DSD, the purpose of the next section (section 2.5) is to outline a number of models for designing organisational conflict management systems and their associated DSD principles.

2.5 Six Conflict Management Models

The DSD literature¹¹⁴ identifies six specific conflict management models that have been developed by DSD practitioners beginning with Ury, Brett and Goldberg. As indicated above in section 2.3, and also as noted by Conbere,¹¹⁵ the work on these conflict management models has been cumulative in that each author or team of authors has built on previous work. For example, in designing her conflict management model for the Canada Customs and Revenue Agency (CCRA), Lynch¹¹⁶ consulted with most of the previous authors, and the Society of Professionals in Dispute Resolution (SPIDR) Track I report,¹¹⁷ outlining SPIDR's conflict management model, included Rowe and Lynch as authors.

¹⁰⁹ At 75.

¹¹⁰ At 78.

¹¹¹ At 81; *The Laws of Australia*, above n 87, at [13.6.890].

¹¹² Ury, Brett and Goldberg, above n 60, at 82.

¹¹³ At 82.

¹¹⁴ See, for example, Conbere, above n 97; Smith and Martinez, above n 90; Eric Brahm and Julian Ouellet "Designing New Dispute Resolution Systems" (September 2003) *Beyond Intractability* <<http://www.beyondintractability.org/essay/designing-dispute-systems>> (last accessed 7 November 2016).

¹¹⁵ Conbere, above n 97, at 217.

¹¹⁶ Lynch, above n 77.

¹¹⁷ Society of Professionals in Dispute Resolution, above n 77.

It should further be noted that, although the focus of the six conflict management models is on DSD in the context of workplace conflict, as outlined by SPIDR, “the principles have equal applicability to all other places where people convene regularly for a purpose and have continuing relationships.”¹¹⁸ Moreover, “the principles apply to addressing conflict in the many workplaces in which employees work closely with people who are not employees.”¹¹⁹ Thus, it is recognised that DSD can be utilised in addressing a variety of conflicts both internal and external to an organisation, whether with employees, suppliers, service providers, contractors, consumers, customers, clients, community, or the broader public.¹²⁰ In addition, in the tax dispute resolution context, the studies by Bentley¹²¹ and Mookhey¹²² provide support for the applicability of DSD in addressing disputes between revenue authorities and taxpayers.

The following sections (sections 2.5.1-2.5.6) provide an overview of each of the six conflict management models and their associated DSD principles. The purpose of this review is to trace the development of the conflict management models and their DSD principles proposed by various authors since Ury, Brett and Goldberg. Section 2.6 will then provide a summary of the conflict management models and an initial set of DSD principles to be utilised in evaluating the effectiveness of the design of the four selected jurisdictions in this study will consequently be derived in section 2.7.

2.5.1 Ury, Brett, and Goldberg

Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict, written by Ury, Brett and Goldberg in 1988, is credited with being the first book written on DSD.¹²³ As outlined above in section 2.3, through a case study of the authors’ actual experience working with coal miners, their union and management, Ury Brett and Goldberg set forth a classic DSD model comprising of three primary dispute resolution methods (interests, rights and power-based approaches), six fundamental principles for setting up dispute resolution procedures and four stages of DSD (organisational diagnosis, system design, implementation, and exit, evaluation, and diffusion). Ury, Brett and Goldberg’s six DSD principles are outlined below:¹²⁴

¹¹⁸ At 33.

¹¹⁹ At 33.

¹²⁰ Lisa B Bingham “Designing Justice: Legal Institutions and Other Systems for Managing Conflict” (2008) 24 Ohio St J on Disp Resol 1 at 11-12; *The Laws of Australia*, above n 87, at [13.6.1010].

¹²¹ Bentley “Problem resolution: Does the ATO approach really work?”, above n 1, updated in Bentley *Taxpayers’ Rights: Theory, Origin and Implementation*, above n 1, at ch 5.

¹²² Mookhey, above n 2.

¹²³ See Ury, Brett and Goldberg, above n 60.

¹²⁴ The three primary dispute resolution methods have been discussed in chapter 1, section 1.1 and in this chapter in section 2.3. The four stages of DSD have been discussed in section 2.4 of this chapter.

- (1) **Put the focus on interests.**¹²⁵ The preference for dispute resolution, at least for first use in most disputes, is for interest-based processes such as negotiation or mediation;
- (2) **Build in “loop-backs” to negotiation.**¹²⁶ Where interest-based procedures do not resolve a dispute and it becomes a rights or power-based dispute, loop-backs are procedures that can be used to encourage parties to return from a rights or power-based approach back to negotiations.¹²⁷ Ury, Brett and Goldberg distinguish such procedures on the basis of whether they encourage disputants to loop-back from a rights contest or from a power contest. As shown in Figure 2.4, loop-backs from a rights-based contest such as arbitration or litigation can include information procedures, advisory arbitration, mini-trial and summary jury trial. Procedures such as these provide the parties with information about their rights and the likely outcome of a rights contest.¹²⁸ The parties may use the information as the basis for further and more constructive interest-based negotiations. Loop-backs from power-based contests include cooling-off periods and intervention by third parties (such as the police) (see Figure 2.4). These procedures allow time for emotions to cool and more rational decisions to be made;¹²⁹
- (3) **Provide low-cost rights and power backups.**¹³⁰ If interest-based processes do not succeed in resolving the dispute, as shown in Figure 2.4, a dispute resolution system should offer low-cost alternatives to litigation based on rights (for example, conventional, expedited or final offer arbitration or med-arb) or power (for example, voting, limited and symbolic strikes or establishing rules of prudence¹³¹);
- (4) **Build in consultation before, feedback after.**¹³² This principle is designed to prevent unnecessary conflict and head off future disputes. Notification and consultation in advance of taking a proposed action affecting others can prevent disputes that arise through sheer misunderstanding.¹³³ Notification and consultation can also reduce the anger and “knee-jerk opposition” that often result when

¹²⁵ Ury, Brett and Goldberg, above n 60, at 42-52.

¹²⁶ At 52-56.

¹²⁷ At 52.

¹²⁸ At 52.

¹²⁹ At 54.

¹³⁰ At 56-60.

¹³¹ Rules of prudence are used where the parties may agree, tacitly or explicitly, to limit the destructiveness of tactics used in power contests: at 60.

¹³² At 61-62.

¹³³ At 61.

decisions are made unilaterally or abruptly.¹³⁴ They also serve to identify points of difference early on so they may be negotiated. Post-dispute analysis and feedback can help parties to learn from their disputes in order to prevent similar disputes in the future.¹³⁵ One means of institutionalising consultation and post-dispute analysis is to establish a regular forum for discussion with parties;¹³⁶

- (5) **Arrange procedures in a low-to-high-cost sequence.**¹³⁷ In order to reduce the costs of handling disputes, the procedures outlined in design principles 1 to 4 above should be arranged in graduated steps in a low-to-high-cost sequence (as shown in Figure 2.4).¹³⁸ For example, in creating a sequence, a designer might begin with interests-based negotiation, move to interests-based mediation, followed by a loop-back procedure and then a low-cost rights-based procedure;¹³⁹
- (6) **Provide the necessary motivation, skills, and resources.**¹⁴⁰ Implied is development of the structural supports that prepare individuals to attempt to understand and use the process that best suits their needs. Training programs and technical assistance must be put in place and adequately sustained to maintain a properly working dispute resolution system.

¹³⁴ At 61.

¹³⁵ At 61.

¹³⁶ At 61.

¹³⁷ At 62-63.

¹³⁸ At 62.

¹³⁹ At 63.

¹⁴⁰ At 64.

Figure 2.4: Low-to-High-Cost Sequence of Dispute Resolution Procedures¹⁴¹

Prevention procedures
Notification and consultation
Post dispute analysis and feedback
Interests-based procedures
Negotiation
Mediation
Loop-back procedures
Rights:
Information procedures
Advisory arbitration
Mini-trial
Summary jury trial
Power:
Cooling-off periods
Third-party intervention
Low-cost backup procedures
Rights:
Conventional arbitration
Expedited arbitration
Med-arb
Final offer arbitration
Power:
Voting
Limited strikes
Symbolic strikes
Rules of prudence

Ury, Brett and Goldberg also advocate for involving the parties in an organisation in the processes of diagnosing and designing the dispute system “to gather information and support” from the outset.¹⁴² They suggest three possible methods for party involvement: establishing a design committee that includes representatives from key interest groups; engaging in shuttle mediation (which can be useful if hostility between the parties is so high that joint sessions would be rendered unproductive); and focusing on key actors (whereby the designer secures the support of key actors with control over the system).¹⁴³

¹⁴¹ Adapted from Ury, Brett and Goldberg, above n 60, at 62-63.

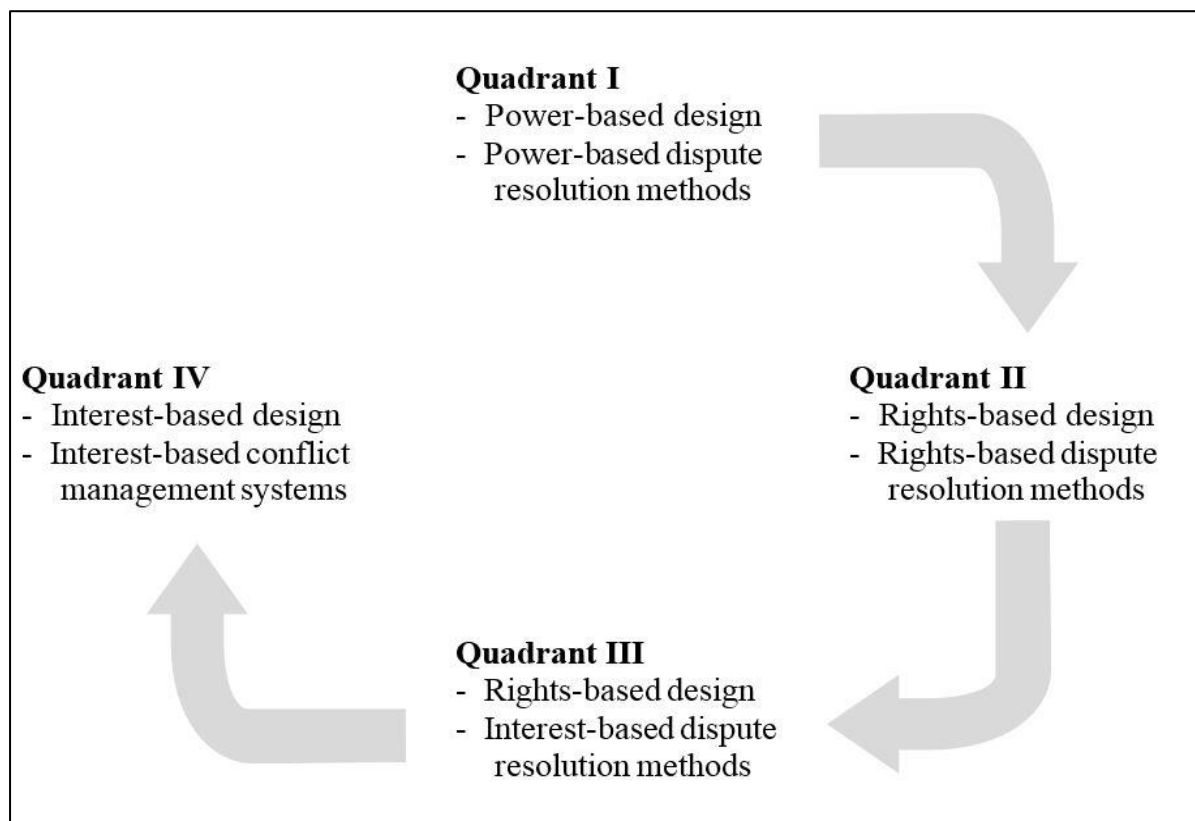
¹⁴² At 69.

¹⁴³ At 69-72.

2.5.2 Costantino and Merchant

In *Designing Conflict Management Systems*, dispute resolution practitioners Costantino and Merchant, add several new developments to Ury, Brett and Goldberg's model.¹⁴⁴ One element in their model relates to the process used in designing a conflict management system. Costantino and Merchant outline an "evolution of resolution continuum" which represents how organisations have historically developed their approaches to managing conflict (see Figure 2.5).¹⁴⁵ They suggest that there are four "quadrants" involved in the continuum, each depicting consecutively more preferable methods of designing conflict management systems.¹⁴⁶

Figure 2.5: Evolution of Resolution Continuum¹⁴⁷



In quadrant one, the elements are power-based design and power-based dispute resolution methods. Accordingly, whoever has power makes and enforces the rules of the organisation. In quadrant two, the design is conducted in a rights-based manner and the resulting system uses rights-based dispute resolution methods. The usual procedure under this quadrant is to provide legislative frameworks for determining who is right and then to pursue such rights through

¹⁴⁴ See Costantino and Merchant, above n 24.

¹⁴⁵ At 50.

¹⁴⁶ At 50.

¹⁴⁷ At 50, Figure 4.1.

litigation and the courts.¹⁴⁸ In quadrant three, the design is rights-based and the resulting system uses interest-based dispute resolution methods. The organisation uses interest-based ADR methods (although rights-based mechanisms are not necessarily absent) but imposes the ADR mechanisms on the disputants without identifying their concerns or preferences and without involving them in the design process.¹⁴⁹ Quadrant three examples include mandatory, court-ordered ADR and mandatory employee dispute resolution programs. In quadrant four, the system is designed in an interest-based manner, and the resulting system incorporates interest-based dispute resolution methods. This approach implies interest-based systems that are “designed *with* stakeholders rather than *for* them.”¹⁵⁰

The concept in quadrant four is thus called “interest-based conflict management systems design.”¹⁵¹ Under such a design process, Costantino and Merchant state the importance of stakeholders having an “active and integral role in creating and renewing the systems they use.”¹⁵² There is an acceptance of the fact that conflicts will arise and, as such, the best method of designing an effective system is to involve the stakeholders, rather than having a system imposed on them. However, quadrant four conflict management systems assume the “willingness of organisational leaders to loosen their perceived obligation to control and unilaterally determine organisational operations in favor of involving those with a stake in organisational conflict.”¹⁵³ Moreover, Costantino and Merchant state that the creation of quadrant four conflict management systems is “certainly not the not the only answer for all organisations, nor even a possibility for many.”¹⁵⁴ Depending on the context and the circumstance of the particular organisation, one or another design process and conflict management system may be necessary.

Costantino and Merchant offer six principles for designing a conflict management system within an organisation:¹⁵⁵

- (1) **Develop guidelines for whether ADR is appropriate.** The goal is to prevent indiscriminate use of ADR when it is not appropriate;

¹⁴⁸ At 51.

¹⁴⁹ At 52.

¹⁵⁰ At 49 (emphasis in original).

¹⁵¹ At 49.

¹⁵² At 53.

¹⁵³ At 58.

¹⁵⁴ At 58.

¹⁵⁵ At 121.

- (2) **Tailor the ADR process to the particular problem.** There is recognition that there are several ADR processes and the best system identifies the appropriate ADR process for each dispute;
- (3) **Build in preventive methods of ADR.** This includes training potential disputants in interest-based problem solving, and using processes such as negotiated rulemaking (reg-neg)¹⁵⁶ collaboratively;
- (4) **Make sure that disputants have the necessary knowledge and skill to choose and use ADR.** Training about conflict management, and publicity about the dispute system and how to access it are necessary;
- (5) **Create ADR systems that are simple to use and easy to access.** Strive to have the systems resolve disputes early, at the lowest organisational level, with the least bureaucracy; and
- (6) **Allow disputants to retain maximum control.** This includes disputants' control over the choice of ADR method and the selection of any third party wherever possible.

Another component to Costantino and Merchant's model is evaluation, which is described as "the means by which the system clarifies its goals and measures progress toward and achievement of those goals."¹⁵⁷ Costantino and Merchant suggest that the evaluation process should be created at the beginning of the conflict management design process, not at the end.¹⁵⁸ Designing the evaluation methodology at the beginning of the intervention ensures that the evaluation is "measuring progress continuously in accordance with the system's defined goals and objectives."¹⁵⁹

2.5.3 Rowe

Rowe, an ombudsperson at the Massachusetts Institute of Technology since 1973, has written various articles in which she lays out her model for conflict management systems design and implementation.¹⁶⁰ Rowe notes three changes in emphasis in conflict management systems that have emerged over time. The first is the idea of a "system" which provides various options and various resource people for all persons in the workplace and all kinds of problems.¹⁶¹ This

¹⁵⁶ Reg-neg draws to the surface the interests of stakeholders (who are also potential disputants) during policy making processes. The reg-neg process gives the agency and its constituents an opportunity to identify their respective interests and to craft modifications to regulations before they are issued: at 125-126.

¹⁵⁷ At 168.

¹⁵⁸ At 168.

¹⁵⁹ At 168.

¹⁶⁰ See, for example, Rowe, above n 77 and Mary P Rowe and Corinne Bendersky "Workplace Justice, Zero Tolerance and Zero Barriers" in Thomas A Kochan and David B Lipsky (eds) *Negotiations and Change: From the Workplace to Society* (Cornell University Press, Ithaca, 2003) 117.

¹⁶¹ Rowe, above n 77, at 84.

approach contrasts with the more traditional methods of providing a single grievance procedure that is only for workers grieving against management, or one designed for a limited list of disputes arising under a contract. A system provides “problem-solving” options based on the interests of the disputants, and “justice” options based on rights and on rights and power.¹⁶² The second major change is the broad idea of conflict management. This may, for example, include the idea of teaching peers, such as managers and co-workers, how to negotiate their differences with each other, teaching a whole workplace to use constructive dissent for continuous improvement, and learning how to prevent some costly conflict.¹⁶³ This implies that conflict management is a more comprehensive idea than just a process for ending specific grievances. A third change is that of “integrating conflict management options and structures with each other, in the context of an overall human resource strategy.”¹⁶⁴

Rowe states that to build effectiveness and trust in a conflict management system, stakeholders should be asked first what they want and then be provided a structured means to give input into both design and continuous improvement.¹⁶⁵ She notes, however, “paradoxically or not, some relatively thoughtful, integrated systems are being set up by using managerial power with relatively little input from employees and managers.”¹⁶⁶ Rowe also believes that certain characteristics of complainants must be considered in fashioning a system. That is, “considering what complainants actually want, which is, if possible, to raise concerns, *as they personally wish to raise them*, is critical to ensuring that a system is actually used.”¹⁶⁷

Rowe offers six specifications for an effective system:¹⁶⁸

- (1) the values of the system;
- (2) the presence of many options;
- (3) multiple access points;
- (4) an organisational ombudsperson;
- (5) wide scope; and
- (6) continuous improvement.

The necessary system values are a commitment to fairness and freedom from reprisal, support by top managers, a powerful senior manager who understands and is an advocate for the

¹⁶² At 84.

¹⁶³ At 84.

¹⁶⁴ At 84.

¹⁶⁵ At 85.

¹⁶⁶ At 85.

¹⁶⁷ At 85 (emphasis in original).

¹⁶⁸ At 87-88.

conflict management system, prevention of conflict where appropriate through active listening and effective communication, and openness to constructive questions and dissent as a means to continuous improvement rather than disloyalty or disrespect.¹⁶⁹ The many options offered are interest-based and rights-based, with the interest-based options usually being “available in parallel, rather than as sequential and required steps of a single procedure.”¹⁷⁰ Furthermore, parties may in some cases agree to “loop forward” from an interest-based option to a rights-based option (or to a rights- and power-based option), or “loop back” from a rights-based option to an interest-based option.¹⁷¹ Thus, Rowe builds on the loop back mechanisms originally proposed by Ury, Brett and Goldberg (see section 2.5.1 above) with the inclusion of loop forward mechanisms. That is, mechanisms which allow parties to move directly to a rights or power-based procedure without going through all of the earlier interest-based options.

Multiple access points entails having a variety of people who have been trained to act as “fair gatekeepers” for the conflict management system so that disputants can find access points of different ethnicity and gender, and varied technical backgrounds.¹⁷² An organisational ombudsperson is a “designated neutral” operating inside an organisation “who is available to help informally with any workplace concern, and to provide workplace mediation as necessary.”¹⁷³ An organisational ombudsperson may further serve as a “counsellor, informal go-between and facilitator, ... informal fact-finder, upward-feedback mechanism, consultant, problem prevention device and change agent.”¹⁷⁴ The ombudsperson should report outside ordinary line and staff structures to the chief executive officer (CEO) or chief operating officer (COO) or plant manager and maintain strict confidentiality.¹⁷⁵

Wide scope means that the system is used by all organisational members without regard for rank, and that all conflicts that are of interest to people in the organisation can be addressed through the system. Continuous improvement involves “an oversight committee [that] is built into the system and meets regularly to improve the effectiveness of the system.”¹⁷⁶

¹⁶⁹ At 87.

¹⁷⁰ At 87.

¹⁷¹ At 88.

¹⁷² At 88.

¹⁷³ At 88.

¹⁷⁴ Mary P Rowe “The Ombudsman's Role in a Dispute Resolution System” (1991) 7 Negotiation J 353 at 353.

¹⁷⁵ Rowe, above n 77, at 88.

¹⁷⁶ At 88.

2.5.4 Lynch

Lynch, a Canadian lawyer and consultant in designing and implementing conflict management systems, proposed a model in *CCRA: Contemporary Conflict Resolution Approaches*,¹⁷⁷ a study for Revenue Canada, in 1998.¹⁷⁸ In line with the work of Rowe, Lynch states that the concept of an integrated conflict management system goes beyond a “case-by-case” approach to resolving disputes in that “integrated systems foster an environment in which managers are expected to prevent, manage, contain and resolve all conflict at the earliest time and lowest level possible.”¹⁷⁹ To support this goal, integrated systems give managers the skills to do so and create performance incentives that make managers accountable for doing so.¹⁸⁰

Lynch built on the previous models in proposing her own. She provides that an organisational dispute resolution model generally should provide a selection of all three dispute resolution approaches – power, rights and interests – with the emphasis being on interest-based options, yet always with recourse to a rights-based option.¹⁸¹ Disputants and managers should, in most cases, be able to choose amongst the dispute resolution options.¹⁸² The system should be designed to accommodate the needs of, and be accessible by, all stakeholders, including the disputants, supervisors, and “bystanders” (that is, “the other people who are not directly involved in the conflict yet are affected by it”).¹⁸³ In addition, knowledgeable persons who can coach disputants and act as organisational referrals should be easily identifiable to disputants. The system should also be accessible for all types of conflicts in an organisation. For example, employee-supervisor, peer-to-peer and manager-to-manager conflicts.¹⁸⁴

In her study, Lynch outlines that an effective conflict management system:¹⁸⁵

- (1) Responds to the interests of all stakeholders;
- (2) Reflects important values (in the instance of the CCRA, the stated values were “integrity, professionalism, respect and cooperation”);
- (3) Promotes the mission of the new agency;
- (4) Is supported by highly visible leadership from key leaders in all stakeholder groups;

¹⁷⁷ See Lynch, above n 77.

¹⁷⁸ Revenue Canada and Canada Customs merged to form the Canada Customs and Revenue Agency (CCRA) in 1999. CCRA subsequently split into Canada Revenue Agency (CRA) and Canada Border Services Agency (CBSA) in 2003.

¹⁷⁹ Lynch, above n 79, at 212.

¹⁸⁰ At 212.

¹⁸¹ Lynch, above n 78, at 101.

¹⁸² At 101.

¹⁸³ At 101.

¹⁸⁴ At 101.

¹⁸⁵ Lynch, above n 77, at 19-26.

- (5) Provides loop-backs forward and backward between rights-based and interest-based options;
- (6) Is fair, friendly, flexible, and fast;
- (7) Promotes resolution at the lowest possible level; and
- (8) Provides structures and systems that assist the organisation in moving from “conflict resolution” to “conflict management” (which includes prevention of conflict).

Lynch further sees the development of the conflict management system as an opportunity to work with new staffing and recruitment in pursuit of a cultural transformation of the organisation.¹⁸⁶ Lynch states that there should be “critical mass training for everyone in a leadership role, both management and labor, plus all other persons who play a role in the conflict chain.”¹⁸⁷ In addition, feedback, monitoring and evaluation mechanisms to improve the system should be present.

2.5.5 *Slaikeu and Hasson*

Slaikeu and Hasson present their model for conflict management systems design in *Controlling the Costs of Conflict*.¹⁸⁸ The authors draw from their work in designing conflict management programs for Brown and Root (now merged with Halliburton), Shell and General Electric. Slaikeu and Hasson provide the following four principles:¹⁸⁹

- (1) Acknowledge four ways to resolve conflict;
- (2) Create options for prevention and early intervention;
- (3) Build collaborative strength through seven checkpoints; and
- (4) Use the mediation model to build consensus among decision makers and users.

The four ways to resolve conflict conform to the list generated by Ury, Brett and Goldberg with the addition of avoidance as an option. However, a key difference is that Slaikeu and Hasson focus on the methods used rather than describing the nature of the process.¹⁹⁰

- (1) Avoidance (the choice not to use any of the other processes);
- (2) Collaboration (the equivalent of interest-based processes);

¹⁸⁶ Lynch, above n 79, at 211-212.

¹⁸⁷ At 213.

¹⁸⁸ See Slaikeu and Hasson, above n 77.

¹⁸⁹ At 17.

¹⁹⁰ At 24.

- (3) Resort to higher-authority (the equivalent of rights-based processes in the respect that the method of a rights-based process is to refer to higher-authority to determine what ought to be done); and
- (4) Unilateral power play (the equivalent of power-based procedures).

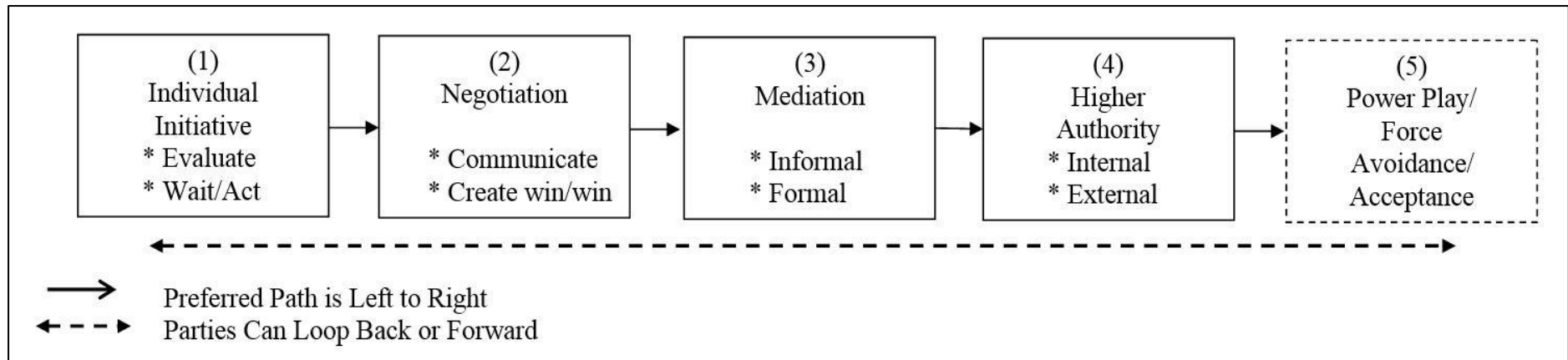
Slaikeu and Hasson note that “most organisational procedures are weighted towards higher-authority resolutions, and many unknowingly encourage avoidance and power play resolutions, thereby increasing costs.”¹⁹¹ They suggest an alternative “preferred path” for cost control (see Figure 2.6), using the methods to resolve conflict in the following order, while also noting that parties can loop backwards or forwards, depending on individual circumstances:¹⁹²

- (1) Individual initiative is used;
- (2) then one tries to negotiate;
- (3) next one tries mediation;
- (4) after that, one appeals to higher authority; and
- (5) finally one resorts to force, or a power play.

¹⁹¹ At 44.

¹⁹² At 46.

Figure 2.6: The Preferred Path for Cost Control¹



¹ Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998) at 47, Figure 5.1.

Slaikeu and Hasson state that “a good system encourages the preferred path by providing multiple options for collaboration and higher-authority procedures that are both fair and perceived as fair by participants.”¹ Participants should always have the right to choose from all methods and also be provided with independent and confidential assistance in selecting and using the available options.² These aspects are consistent with the conflict management models of previous authors.

Furthermore, best practice includes the creation of internal and external subsystems geared towards encouraging prevention and early intervention in conflict. Thus, Slaikeu and Hasson outline a template for all organisations which includes four boxes describing aspects of the system in terms of internal and external components for resolution (see Figure 2.7).³ Box one involves site-based resolution. This refers to options available internally within a department, business unit or organisation. Through the chain of command or line of authority, managers, employees and customers attempt collaboration (individual initiative, negotiation, mediation) as the first recourse. Higher-authority procedures are then utilised as needed, including the ability to appeal a decision to the next level of supervision. Box two features internal support mechanisms to assist parties in selecting and using available conflict management options. These can include ombudspersons, human resources, internal mediators and employee assistance programs (EAPs). Box three provides for the convening of external ADR to prevent disputes from escalating prematurely to the courts or other outside entities. External ADR processes include mediation, arbitration, mini-trial and fact finding. Box four encompasses external higher authority options such as litigation and hearings by courts and governmental agencies.

The preferred path occurs both within and across the four boxes.⁴ Figure 2.7 indicates that site-based resolution is the preferred place to start, followed by internal support, external convening and external higher authority. Within each box, the parties are encouraged to consider collaborative, low-cost resolutions first while still preserving the option of moving directly to a higher-authority procedure if that would serve them best.⁵

¹ Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998) at 49.

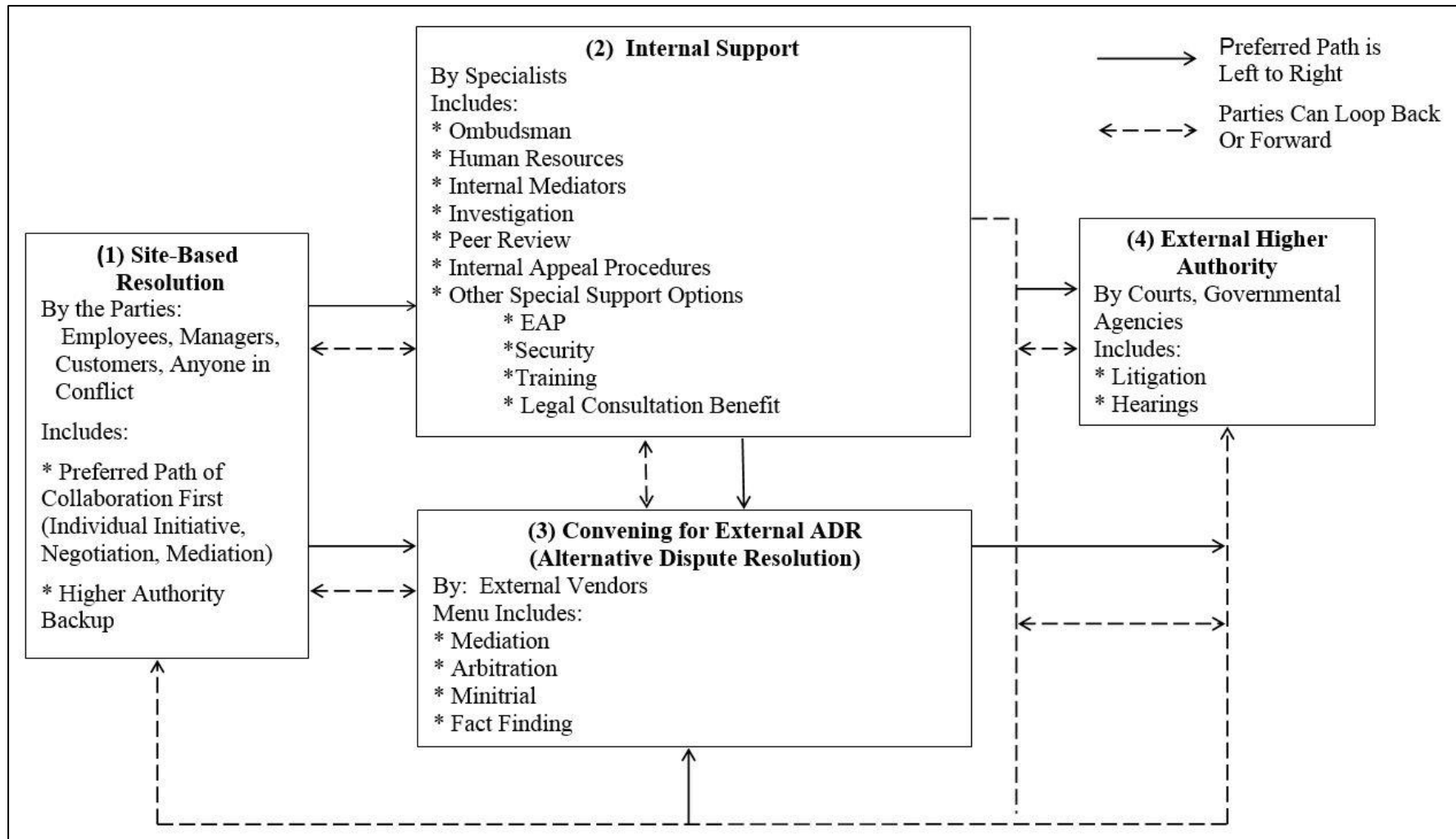
² At 49.

³ At 54-59.

⁴ At 59.

⁵ At 63.

Figure 2.7: Comprehensive System Template¹



¹ Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998) at 56, Figure 6.1.

Slaikeu and Hasson introduce seven structural subsystems or “checkpoints” which they consider necessary for the success of the conflict management system:¹

- (1) **Policy.** The organisation must have a clear conflict management policy that supports the preferred path, illustrated by a pictorial description of the system;
- (2) **Roles and responsibilities.** These must be defined for employees and managers within each box;
- (3) **Documentation.** Write or rewrite documents such as contracts and employee manuals to encourage the use of the preferred path via the pictured system;
- (4) **Selection.** This involves developing selection criteria and procedures to foster the collaborative ability of employees, managers and external specialists;
- (5) **Training and education.** Identify the skills needed and develop the training for employees, managers, and specialists;
- (6) **Support.** Develop systems to support early resolution of conflict, including formal or informal coaching for all disputants; and
- (7) **Evaluation.** Collect data to provide appropriate feedback to improve the system.

In addition, “successful rewiring to build collaborative strength in an organization requires consensus among those who will use the system and those who decide whether to allocate resources to the effort.”² Thus, Slaikeu and Hasson suggest that the “mediation model” should be used as a guide to create consensus around the design, implementation and review phases of conflict management systems design.³

2.5.6 Society of Professionals in Dispute Resolution

The ADR in the Workplace Committee (Track I)⁴ of the Society of Professionals in Dispute Resolution (SPIDR) published *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations* in 2001.⁵ As noted above in section 2.5, the Track I Committee included previous authors Rowe and Lynch as well as

¹ Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998) at 77-79.

² At 159.

³ At 159.

⁴ The work of the ADR in the Workplace initiative was organised into three tracks: Track I, ADR in the Employment Sector; Track II, ADR in the Organized Workforce; and Track III, International Structures and the Role of Workplace ADR Globally.

⁵ See Society of Professionals in Dispute Resolution *Designing Integrated Conflict Management Systems: Guidelines for Designers and Decision Makers in Organizations* (Washington DC, 2001). SPIDR merged with the Academy of Family Mediators (AFM) and the Conflict Resolution Education Network (CREnet) to form the Association for Conflict Resolution (ACR) in 2001.

other well-known dispute resolution academics and practitioners.⁶ In developing the guidelines, comments were sought from a broad spectrum of the dispute resolution community, including practitioners working with or within private companies, non-profit organisations, and government agencies.

SPIDR outline that organisations generally move through four phases in addressing conflict.⁷ Organisations in the first phase have no defined institutional dispute resolution processes. Organisations in the second phase have introduced rights-based grievance procedures – some ending in adjudication processes such as peer review and arbitration – for the resolution of conflict.⁸ SPIDR note that “today, all unionized organizations, most government agencies, and most medium and large-sized non-unionized organizations have internal rights-based grievance processes.”⁹ Some organisations have moved to the third phase, by introducing specific interest-based processes, often some form of mediation, to supplement rights-based processes.¹⁰ However, increasingly, organisations are moving to the fourth phase, by developing integrated conflict management systems. These systems “include both grievance processes and mediation, but go beyond them, introducing a systematic approach to preventing, managing, and resolving conflict”¹¹

Reflecting the earlier work of Rowe and Lynch, the SPIDR report finds that integrated conflict management systems are needed as most grievance procedures and mediation programs are available only to address conflicts that are framed as violations of policy, contract, or law and “these procedures and programs are therefore not available to address many other kinds of interpersonal disputes that cause significant disruption” in the workplace.¹² SPIDR also state that while the more formal dispute resolution processes such as grievance procedures and mediation are necessary, they are insufficient because they usually address only the symptoms of conflict, not the sources.¹³ Against this background, SPIDR propose that effective conflict management systems should have the following characteristics:¹⁴

⁶ The Track I committee was co-chaired by Ann Gosline and Lamont Stallworth. Other members of the committee were: Myrna Adams, Norman Brand, Cynthia Hallberlin, Carole Houk; David Lipsky, Nancy Peace and Anne Thomas.

⁷ Society of Professionals in Dispute Resolution, above n 5, at 7-9.

⁸ At 7.

⁹ At 7.

¹⁰ At 7.

¹¹ At 8.

¹² At 8.

¹³ At 8.

¹⁴ At 9.

- (1) Options for addressing all types of problems that are available to all types of people in the workplace, including employees, supervisors, professionals and managers;
- (2) Creation of a culture that welcomes dissent and encourages resolution of conflict at the lowest level through direct negotiation;
- (3) Provision of multiple access points and persons that are easily identified as knowledgeable and trustworthy for approaching for advice about the conflict management system;
- (4) Multiple options for addressing conflict, including rights-based and interest-based processes;¹⁵ and
- (5) Provision of a systemic structure that coordinates and supports the multiple access points and multiple options and that integrates effective conflict management practices into the organisations daily operations.

In addition, to implement an integrated conflict management system successfully, an organisation must develop support throughout its infrastructure. SPIDR state that people at all levels of the organisation must believe and communicate the same message: “that conflict can and should be actively managed through one of the many channels of the integrated conflict management system.”¹⁶ SPIDR outline the following list of supporting strategies, processes, and structures necessary to achieve this:¹⁷

- (1) Sincere and visible championship by senior management and workplace/union leaders;
- (2) A “continuous” oversight body composed of representatives from all key stakeholder groups;
- (3) A person or persons functioning in the role of internal independent confidential neutral(s);
- (4) A central coordinating point (office or group);
- (5) System evaluation and monitoring mechanisms;
- (6) “Critical mass” training, “just-in-time” on-the-spot training for individuals as needed, and educations of managers, supervisors, union personnel, and human services personnel;
- (7) Alignment of the “philosophy of conflict competency” with the mission, vision, values, and policies of the organisation;
- (8) Institutionalised incentives for effective conflict management, woven into the performance appraisal system;

¹⁵ The provision for loop-backs in the system is also indicated: “Employees have the opportunity in appropriate cases to move between rights-based grievance procedures and interest-based processes ... For example, an employee who files a grievance may also be able to pursue mediation if all disputants agree”: at 10-11.

¹⁶ At 14.

¹⁷ At 14-16.

- (9) An interest-based communication strategy developed through discussions with workplace stakeholders and carefully implemented from the start of the process;
- (10) Cost incentives that encourage managers and employees to deal with conflict early and effectively; and
- (11) Sufficient financial and human resources allocated to the system.

SPIDR further recognise that an integrated conflict management system will work only if designed with input from users and decision makers at all levels of the organisation.¹⁸ Moreover, there is no ideal integrated conflict management system that will fit all organisations. Each system must be tailored to fit the organisation's needs, circumstances, and culture.¹⁹

2.6 Summary of the Six Conflict Management Models

Table 2.1 provides a summary of the main features of the six conflict management models outlined in section 2.5 above. The summary is based on a comparison of the six conflict management models undertaken by Conbere.²⁰ However, it should be noted that the main purpose of Conbere's research was not to compare the six conflict management models per se. Rather, it was to examine, using "Dublin's Model for Theory Building",²¹ the elements necessary "to validate and improve the developing theory about organizational conflict management system design and implementation."²²

¹⁸ At 6.

¹⁹ At 6.

²⁰ See John P Conbere "Theory Building for Conflict Management System Design" (2001) 19 Conflict Resol Q 215. To the researcher's knowledge there are currently no other studies which provide a comprehensive side-by-side comparison of the six conflict management models.

²¹ Dubin outlines a framework for theory building consisting of eight elements. However, it is beyond the scope of this study to consider this framework. For further information, see Robert Dubin *Theory Building* (Free Press, New York, 1978).

²² Conbere, above n 20, at 215.

Table 2.1: Comparison of the Six Conflict Management Models¹

Category of DSD principle	Ury, Brett and Goldberg	Costantino and Merchant	Rowe	Lynch	Slaikeu and Hasson	Society of Professionals in Dispute Resolution
Design phase	Parties in the organisation are involved in the design process.	Four quadrants – most developed is interest-based design and process.	Ask stakeholder if system is wanted; use stakeholder input.	Responds to interests of all stakeholders; stakeholder participation in the design process.	Uses the mediation model to create consensus among decision makers and users.	Four phases – most developed is integrated conflict management system which includes a participatory design.
Types of processes	Puts the focus on interest-based processes but also recognises that rights and power-based processes may be necessary.	Has multiple options – use the most appropriate; builds in preventative methods of ADR.	System has interest, rights and power-based processes; has a focus on prevention.	Uses interest and rights-based processes; recognises power-based process as necessary in some instances; has a focus on prevention.	Resolution through interest, rights, power and avoidance; has a focus on prevention.	System has interest and rights-based processes; has a focus on prevention.
Nonlinear design	Provides for loop-backs.		Provides for loops backward and forward.	Provides for loops backward and forward.	Provides for loops backward and forward.	Provides for loop-backs.
Support for disputants	Consultation before and feedback after the resolution process.		Organisational ombudsperson is included in system.	Independent confidential neutrals who can coach and act as referrals within the system.	Support system (including coaching) to support early resolution.	Has a person or persons who function as internal independent confidential neutral(s).

¹ The column and row headings of Table 2.1 have been adapted from John P Conbere “Theory Building for Conflict Management System Design” (2001) 19 Conflict Resol Q 215 at 228-230, Table 1. The row heading “Support for all stakeholders” was originally “Support for all employees” (which reflected the original application of DSD in the context of workplace disputes).

Category of DSD principle	Ury, Brett and Goldberg	Costantino and Merchant	Rowe	Lynch	Slaikeu and Hasson	Society of Professionals in Dispute Resolution
Keep financial and emotional costs low	Orders procedures from low to high cost; low-cost rights and power backups.		Begins with an inclusive understanding of conflict management.	Promotes resolution at the lowest level; has structures to move from conflict resolution to conflict management.	Preferred path for cost control encourages a low to high cost order of procedures; encourages the creation of options for prevention and early resolution.	Promotes resolution at the lowest level; costs are allocated to provide incentives to managers and employees to deal with conflicts early and effectively.
Support for all stakeholders	Provides motivation, skills and resources.	Includes training about skills and dispute system; system is easy to use.	Has multiple access points.	Has multiple access points and provides processes for all people, including bystanders; critical mass training.	Includes training and education.	Has multiple access points; includes training a critical mass and other individuals as needed.
Ensure appropriate use of ADR		Has guidelines for when ADR is appropriate.		Has conflict management coordinator and process advisors to help select the best option.	Assistance is offered for choosing best process.	
Disputant control of choices		Disputants have maximum control over choice of process.	Interest-based options available in parallel with other options.	Best systems are multi-option with disputants selecting.	Disputants have the right to choose preferred process.	Employees can choose problem-solving and/or enforcement of rights.
Fairness and other values			Organisation is committed to fairness and freedom from reprisal.	System is fair, friendly, flexible and fast.	System is fair and perceived as fair.	System should foster a culture that welcomes good-faith dissent.

Category of DSD principle	Ury, Brett and Goldberg	Costantino and Merchant	Rowe	Lynch	Slaikeu and Hasson	Society of Professionals in Dispute Resolution
Leadership support			Is supported by top managers.	Is supported by top leaders, both management and labour.		Senior management and union leaders' sincere support is needed.
Integration of program into the organisation			System is integrated into the organisation's human resources strategy; system is used by all organisational members.	System reflects organisation's important values; promotes organisational mission; aligns internal culture with external services; aligns system with procedures such as hiring, performance measurement and policies.	Organisation develops policy, roles and responsibilities, documentation, criteria for selection and hiring of employees, managers, external and internal specialists.	System is aligned with mission, vision and values; incentives are institutionalised; conflict management is included in performance appraisal.
Evaluation		Has evaluation to improve the system.	Has continuous improvement with oversight committee.	Has evaluation to improve the system.	Has evaluation to improve the system.	Has evaluation to identify strengths and weaknesses of design and foster continuous improvement.

When the six models are put side by side, it can be seen that although the DSD principles are articulated differently, a number of similarities stand out within each category of principles. As noted above in section 2.5, each of the models build on the models that have come before them, with Ury Brett and Goldberg's concepts found in the later models. In addition, the DSD principles reflect the evolution of DSD from Ury, Brett and Goldberg's tripartite distinction of power, rights and interest-based approaches towards a systems-based approach as outlined in section 2.2 above.

With respect to the design phase itself, each model allows for various kinds of design centred on stakeholder involvement in the design process. However, Rowe notes that even though participative design would appear to be the most effective, there are top-down designs that have been effective.¹

The models support the development of conflict management systems with a variety of processes and consistent with Ury, Brett and Goldberg, all models support the inclusion of interest-based processes where possible. The models suggest that disputants should be offered the opportunity to select the process which they are most comfortable with and that they believe will most effectively meet their needs. With the exception of Costantino and Merchant, all models provide for loop-backs in the system to encourage parties to return from rights or power contests to interest-based negotiations. The models of Rowe, Lynch and Slaikeu and Hasson also provide for loops forward in the system such that parties are not necessarily required to go through all the earlier interests-based options in the system.

To promote the early resolution of conflict, support for disputants is included in the four later models through the use of organisational ombudspersons, independent confidential neutrals within the system and/or coaching. Excepting Costantino and Merchant, all models include the assumption that, the conflict management process generally ought to move from low to high cost. All models have some elements that address supporting stakeholders to use the conflict management system in terms of multiple access points for disputants and/or providing training and education in conflict resolution. Costantino and Merchant, Lynch, and Slaikeu and Hasson recommend guidelines or the provision of assistance to ensure the appropriate use of ADR methods. Although the other models do not specifically address this, the idea is consistent with the other parts of their models.

Most of the models explicitly support systems that are fair to parties and are free of reprisal for using the system. Leadership support and integration of the system into the organisation are also supported by the majority of the models. Slaikeu and Hasson offer further

¹ Mary P Rowe "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" in Sandra Gleason (ed) *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (Michigan State University Press, East Lansing, 1997) 79 at 85.

recommendations about how to institutionalise the conflict management system in terms of developing policy and understanding roles. The models also typically emphasise the use of evaluation to improve the conflict management system.

2.7 The Dispute Systems Design Principles Utilised in this Study

Against the background of the conflict management models summarised in section 2.6 above, the following general DSD principles (with accompanying explanations) to be utilised in evaluating the designs of tax dispute resolution systems of the four selected jurisdictions have been derived by the researcher (as shown in Table 2.2).² The DSD principles and explanations are expressed in the context of workplace disputes in which they were originally formulated. However, in line with the objectives of this study, modifications to the DSD principles in the context of tax dispute resolution will take place following the DSD evaluations of the tax dispute resolution systems of the four selected jurisdictions.

² The DSD principles in Table 2.2 are listed by number. However, the numbers do not correspond to a ranking of the principles.

Table 2.2: The 14 General Dispute Systems Design Principles³

(1)	Stakeholders are included in the design process. Stakeholders should have an active and integral role in creating and renewing the systems they use.
(2)	The system has multiple options for addressing conflict including interests, rights and power-based processes. The system should include interests-based processes and low-cost rights and power-based processes should be offered should interest-based processes fail to resolve a dispute.
(3)	The system provides for loops backward and forward. The system should include loop-back mechanisms which allow disputants to return from rights or power-based options back to interests-based options and also loop-forward mechanisms which allow disputants to move directly to a rights or power-based option without first going through all of the earlier interests-based options.
(4)	There is notification before and feedback after the resolution process. Notification in advance of taking a proposed action affecting others can prevent disputes that arise through misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future.
(5)	The system has a person or persons who function as internal independent confidential neutral(s). Disputants should have access to an independent confidential neutral to whom they can go to for coaching, referring and problem-solving.
(6)	Procedures are ordered from low to high cost. In order to reduce the costs of handling disputes, the procedures in the system should be arranged in graduated steps in a low to high cost sequence.
(7)	The system has multiple access points. The system should allow disputants to enter the system through many access points and offer a choice of persons whom system users may approach in the first instance.
(8)	The system includes training and education for stakeholders. Training of stakeholders in conflict management as well as education about the dispute system and how to access it are necessary.
(9)	Assistance is offered for choosing the best process. This includes the use of guidelines and/or coordinators and process advisors to ensure the appropriate use of processes.
(10)	Disputants have the right to choose a preferred process. The best systems are multi-option with disputants selecting the process.
(11)	The system is fair and perceived as fair. The system should be fair to parties and foster a culture that welcomes good faith dissent.
(12)	The system is supported by top managers. There should be sincere and visible championship by senior management.
(13)	The system is aligned with the mission, vision and values of the organisation. The system should be integrated into the organisation and reflect the organisational mission, vision and values.
(14)	There is evaluation of the system. This acts to identify strengths and weaknesses of design and foster continuous improvement.

³ Table 2.2 has previously been published in Melinda Jone “Evaluating Australia’s Tax Dispute Resolution System: A Dispute System Design Perspective” (2015) 13 EJTR 552 at 557; Melinda Jone “Evaluating New Zealand’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (2016) 22 NZJTL 228 at 233 and Melinda Jone “What can the United Kingdom’s Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective” (2017) 32(1) ATF 59.

The 14 DSD principles derived generally correspond to the 12 categories of DSD principles in column one of Table 2.1. However, the category “Support for disputants” includes two separate DSD principles: “There is notification and consultation before and feedback after the resolution process” and “The system has a person or persons who function as internal independent neutral(s).” The category “Support for all stakeholders” also contains two DSD principles: “The system has multiple access points” and “The system includes training and education for stakeholders.” The next section now reviews the two extant studies which utilise DSD principles in evaluating tax dispute resolution systems.

2.8 Bentley’s and Mookhey’s Studies

As noted in chapter 1, section 1.2.1, to the researcher’s knowledge, only two researchers have conducted studies utilising DSD principles in analysing dispute resolution systems (and complaint handling systems) in the tax context. Both researchers utilised Ury, Brett and Goldberg’s six DSD principles in their analyses. Notwithstanding that the focus of Bentley’s⁴ study is on the effectiveness of the design of the ATO’s complaint handling procedures, the use of DSD principles in his analysis is relevant to this present study. Mookhey’s⁵ study follows a similar process of analysis, but the focus of her study is on the ATO’s tax dispute resolution procedures. Sections 2.8.1 and 2.8.2 discuss the research conducted by Bentley and Mookhey respectively and section 2.8.3 provides some general comments.

2.8.1 Bentley

Bentley’s research in 1996 analyses the ATO’s complaint handling procedures developed for the then proposed ATO Taxpayers’ Charter (the Charter). The Charter articulates the rights of taxpayers, thereby providing a focus for resolution of conflicts in the area.⁶ However, “the rights protected in the Charter are limited to process and cannot deal effectively with matters of substance relating to the operation of the law.”⁷ Bentley states that “process” relates to procedural issues, such as the giving of reasons for a decision, whereas, “substance” refers to matters of law, such as whether expenditure is deductible.⁸ Accordingly, “it is likely that the majority of complaints raised under the Charter will not develop into disputes.”⁹ Hence, as

⁴ Duncan Bentley “Problem resolution: Does the ATO approach really work?” (1996) 6(1) Revenue LJ 17, updated in Duncan Bentley *Taxpayers’ Rights: Theory, Origin and Implementation* (Kluwer Law International, The Netherlands, 2007) ch 5.

⁵ Sheena Mookhey “Tax dispute systems design” (2013) 11 EJTR 79.

⁶ Bentley “Problem resolution: Does the ATO approach really work?”, above n 4, at 23.

⁷ At 23.

⁸ At 23.

⁹ At 34.

stated above, Bentley's research focuses on the taxpayer complaint handling procedures as opposed to tax dispute resolution procedures in Australia.

By way of background, the Charter was introduced as a direct result of a shift in the ATO's approach to compliance.¹⁰ International research by the ATO "led it to realize the importance of having a high concern for taxpayer interests so that it could achieve its own goal of increased taxpayer compliance and reduced conflict escalation."¹¹ Furthermore, the ATO realised that it needed to introduce an appropriate internal review mechanism to uphold the rights included in the Charter.¹² Accordingly, the ATO used the Problem Resolution Unit (PRU) model as the basis for developing its complaint handling process under the Charter.¹³ PRUs were set up in ATO offices around the country with the aim of identifying the problems giving rise to complaints so that they could be reviewed and resolved.¹⁴ PRUs were to be used once the normal channels for review were exhausted. They concentrated on serious complaints involving, for example, administrative delays in issuing assessments, conducting audits and responding to letters.¹⁵ They also reviewed decisions and actions of ATO officers that were not open to other forms of review, such as the right of appeal to the Administrative Appeals Tribunal (AAT).¹⁶ PRU staff acted as "advocates for the taxpayer within the ATO."¹⁷ Bentley states that this approach is consistent with a "problem solving approach that attempts to deal with the underlying interests of the parties concerned, in a way that is seldom possible in a more formal tribunal or court setting."¹⁸

Henceforth, Bentley sought to examine whether the ATO's complaint handling processes measured up to the standards of best practice developed in DSD theory. Bentley thus outlines the "ATO model" for complaint handling (essentially encompassing the PRU model and external appeal to the Commonwealth Ombudsman)¹⁹ and then utilises Ury, Brett and Goldberg's six DSD principles to evaluate the effectiveness of the design of the ATO's complaint handling procedures. Bentley found that the complaint handling procedures of the

¹⁰ Bentley *Taxpayers' Rights: Theory, Origin and Implementation*, above n 4, at 186.

¹¹ At 186.

¹² Bentley "Problem resolution: Does the ATO approach really work?", above n 4, at 32.

¹³ The ATO's experience with the PRU model provided the basis for the ATO's current complaint handling process under the Charter which is known as ATO Complaints.

¹⁴ Bentley "Problem resolution: Does the ATO approach really work?", above n 4, at 33.

¹⁵ At 33.

¹⁶ At 33.

¹⁷ At 33.

¹⁸ At 32.

¹⁹ From 1 May 2015, most tax complaints previously handled by the Commonwealth Ombudsman are now handled by the Inspector-General of Taxation (IGT).

ATO has features of all six principles of best practice in DSD advocated by Ury, Brett and Goldberg. Bentley concludes that:²⁰

The approach of the ATO, and the conflict resolution model that it has chosen to use, supports the assumption that it is eager to seek to resolve the problems of taxpayers to better achieve its own goals of increased taxpayer compliance.

However, Bentley suggests that: “The ATO model should be more flexible. Multiple entry points at the first level and provision for more interaction in the problem-solving process would make it more effective.”²¹ Flexibility and interaction are the basis for much interest-based problem-solving. Preventing flexibility and interaction by implementing an “over-formalised” model can be counter-productive.²² Bentley’s analysis of the ATO complaint handling process also highlights the need, in procedural matters, for some alternative to negotiation when it fails to produce a satisfactory outcome. He suggests that “low-cost, rights-based procedures should be available, at least to the STCT²³ and the AAT.”²⁴ In addition, Bentley notes that the ATO model should allow taxpayers to give feedback on the handling of their complaint for ATO monitoring and reporting purposes.²⁵

Bentley’s 1996 paper was updated by his further research in 2007²⁶ in which he sought to develop a model charter of taxpayers’ rights to be utilised as best practice in tax administration.²⁷ In his model charter, Bentley proposes that: “There shall be constituted a dispute resolution system designed to provide an informal mechanism for early resolution of disputes arising between taxpayers and the revenue authority.”²⁸ Using the analysis of the complaint handling procedures conducted in his earlier research as an underlying basis, Bentley states that:²⁹

Based on the successful application by the ATO of the principles put forward by Ury, Brett and Goldberg in its Charter dispute resolution process, the Model should include all six, with two additional principles as follows:

²⁰ At 41.

²¹ At 42.

²² At 41.

²³ Section 27 of the Tribunals Amalgamation Act 2015 (Cth) abolished the Small Taxation Claims Tribunal (STCT) of the AAT with effect from 1 July 2015.

²⁴ At 42.

²⁵ At 42.

²⁶ Bentley *Taxpayers’ Rights: Theory, Origin and Implementation*, above n 4, at ch 5.

²⁷ See Bentley *Taxpayers’ Rights: Theory, Origin and Implementation*, above n 4, at ch 9 for a detailed outline of the model charter of taxpayers’ rights.

²⁸ At 381.

²⁹ At 211-212.

1. Prevent unnecessary conflict through notification, consultation and feedback.
2. Create ways of reconciling the interests of those in dispute.
3. Build in 'loop-backs' to negotiation.
4. Provide low-cost alternatives where negotiation fails.
5. Create sequential procedures moving from low-cost to high-cost.
6. Provide the necessary motivation, skills and resources to allow the system to work.
7. Provide effective mechanisms for measuring qualitative success.
8. Provide mechanisms for monitoring, review and improvement both at individual and systemic levels.

The two additional DSD principles included by Bentley in 2007 can, in part, be traced to the work of Costantino and Merchant,³⁰ and Slaikeu and Hasson.³¹ With respect to the principle of providing effective mechanisms for measuring qualitative success, Costantino and Merchant suggest that there should be evaluation of both the impact and effectiveness of the problem resolution system and its administration and operation.³² Applying this in the tax dispute resolution context, this includes mechanisms for “examining satisfaction of taxpayers with the resolution process, their relationship with the revenue authority and the outcome of the process.”³³ However, with respect to the ATO complaint handling procedures, as noted in his earlier research in 1996, Bentley states that there does not appear to be a formal procedure for obtaining and measuring specific feedback from the taxpayer on the complaint handling process.³⁴

The principle of providing mechanisms for monitoring, review and improvement both at individual and systemic levels includes collecting and evaluating data to provide regular feedback to improve the system.³⁵ Applying this principle in relation to the ATO complaint handling procedures, monthly reports are made by ATO Complaints to the ATO Executive.³⁶ These reports include: complaint volumes; performance against identified key performance indicators such as service standards and other quality assurance measures; and alerts about issues that have led or are likely to lead to complaints, including systemic issues.³⁷ Quarterly

³⁰ Cathy A Costantino and Christina S Merchant *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, San Francisco, 1996).

³¹ Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998).

³² Costantino and Merchant, above n 30, at ch 10.

³³ Bentley *Taxpayers' Rights: Theory, Origin and Implementation*, above n 4, at 201.

³⁴ At 200.

³⁵ See Costantino and Merchant, above n 30, at ch 10; Slaikeu and Hasson, above n 31, at ch 15.

³⁶ Bentley *Taxpayers' Rights: Theory, Origin and Implementation*, above n 4, at 197.

³⁷ At 197.

reviews are also conducted on random samples of complaints.³⁸ General reports on the reviews are circulated in addition to individual results being provided to the relevant “ATO complaint resolvers.”³⁹ The outcomes of these reviews also inform staff training and skills development strategies.⁴⁰

Notwithstanding that Bentley’s research focuses on the effectiveness of the design of the complaint handling procedures of the ATO, his research is of significance as it represents an initial application of DSD analysis in dispute resolution systems in the particular context of taxation. Furthermore, while Bentley’s initial analysis in 1996 is conducted using Ury, Brett and Goldberg’s six principles, in his updated research in 2007, Bentley introduces several DSD principles developed since Ury, Brett and Goldberg. Although, unlike this present study, Bentley’s research was not specifically aimed at utilising a comprehensive range of DSD principles.

2.8.2 *Mookhey*

Mookhey seeks to consider the effectiveness of the design of the current ATO dispute resolution process according to Ury, Brett and Goldberg’s six DSD principles. Mookhey’s study is wider in scope than Bentley’s on the basis that she classifies tax disputes with the ATO as generally coming within four categories:⁴¹

- (a) Complaints;
- (b) Objections to private binding rulings given to taxpayers on tax-related issues by the ATO;
- (c) Disputes as to facts or the application of tax law by a taxpayer as matters are being assessed by the ATO; and
- (d) Objections to assessments of liability to tax.

Categories (b) and (d) generally refer to statutory rights, while categories (a) and (c) relate to administrative due process.⁴² Against the background of this expanded scope, Mookhey outlines the available processes for resolving tax disputes in Australia. She describes that the “ATO dispute resolution model”, existing at that time, as consisting of four layers:⁴³

³⁸ At 197.

³⁹ At 198.

⁴⁰ At 198.

⁴¹ Mookhey, above n 5, at 83.

⁴² Unlike in this current study, Mookhey includes complaints as a category of tax dispute. As stated in section 2.2.1 of this chapter, complaints do not fall within the definition of tax disputes in this study as generally they cannot be filed for substantive tax issues.

⁴³ Mookhey, above n 5, at 83.

... [T]he ATO (internal), the Commonwealth Ombudsman (external, administrative), the Administrative Appeals Tribunal (the AAT) (external, administrative) and the courts (external, judicial). Alternative Dispute Resolution (ADR) and the Taxpayers' Charter are supplemental features.

Mookhey goes on to evaluate the ATO dispute resolution model against the criteria of Ury, Brett and Goldberg's six DSD principles. Along similar lines to Bentley in 1996, she concludes that: "Overall, the ATO dispute resolution model supports its assertions that it's eager to seek to resolve disputes with taxpayers."⁴⁴ She states that the ATO model possesses "much of the best-practice principles advocated by the Ury, Brett and Goldberg model such as clear, multi-step procedures and emphasis on negotiation, notification and consultation."⁴⁵ However, Mookhey also notes that there are some deficiencies in the ATO model that require reform. She suggests:⁴⁶

In particular, reforming the ATO model so that there is an increase in transaction costs at each level and affordable access to first-level external review is highly desirable, so as to increase the pressure for a negotiated outcome at an early stage.

Nevertheless, her research does not go as far as exploring practical options for implementing the abovementioned reform of the ATO model. In addition, similar to Bentley's research in 1996, Mookhey states that "significantly missing from the ATO model is a formal procedure for obtaining feedback from taxpayers as parties to tax disputes."⁴⁷ She also notes that there has been "a lot of criticism levelled at the day-to-day ATO officers' capacity to engage in meaningful and effective dispute resolution" and suggests that further improvement to the ATO model "should come with the specific dispute resolution training initiatives for ATO personnel."⁴⁸

2.8.3 General comments

Bentley's and Mookhey's studies focus on the complaint handling and tax dispute resolution procedures, respectively, solely in the context of Australia. Accordingly, there is scope for a comparative DSD analysis to be conducted on the tax dispute resolution procedures in other

⁴⁴ At 94.

⁴⁵ At 94.

⁴⁶ At 94.

⁴⁷ At 93. In the period of time since Mookhey's study, the ATO have implemented various feedback mechanisms. These are discussed in this thesis in chapter 4, section 4.3.2 under DSD Principle 4 (notification before and feedback after the resolution process).

⁴⁸ At 93. In the period of time since Mookhey's study, the ATO have implemented various dispute resolution training initiatives. These are discussed in this thesis in chapter 4, section 4.3.2 under DSD Principle 8 (training and education for stakeholders).

jurisdictions in order to compare the effectiveness of the design of different jurisdictions' tax dispute resolution procedures. Furthermore, given that it was beyond the scope of both studies to utilise a comprehensive range of DSD principles in analysing the effectiveness of the design of the ATO's complaint handling and tax dispute resolution procedures, it is worthwhile developing a more comprehensive set of DSD principles which could be utilised as general guidance and if necessary, subsequently adapted, by international tax administrations in designing and/or improving their tax dispute resolution systems. Consequently, the above limitations in the scope of Bentley's and Mookhey's studies provide the basis for the objectives of this study outlined in chapter 1, section 1.3.

2.9 Summary

This chapter has outlined certain definitional aspects relevant to this study and reviewed selected prior literature on DSD. For the purposes of this study, tax disputes are defined as occurring when there is a disagreement between the taxpayer and the tax authority in respect of the taxpayer's tax liabilities or entitlements and related issues. Excluded from this definition are taxpayer complaints relating to the standard of service received by taxpayers and other procedural issues relating to the tax dispute resolution process. In addition, as the tax disputes in the selected jurisdictions in this study principally arise through taxpayer audits, this study focuses on post-filing tax disputes and accordingly, the associated post-filing dispute resolution processes.

This chapter also outlines the definition of ADR utilised in this study: "an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them."⁴⁹ This definition, by the former NADRAC, has been utilised in order to encompass a broad range of dispute resolution processes used within and outside courts and tribunals, excluding judicial determination.

The chapter then turns to reviewing the relevant literature in the area of DSD. The concept of DSD, in the context of workplace conflict, originated in the book *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* by Ury, Brett and Goldberg in 1988.⁵⁰ They outline three approaches to resolving disputes (interests, rights and power-based) and suggest that an organisation can improve its conflict management capacity by shifting its dispute resolution system, over time, from one dominated by power and rights-based approaches to

⁴⁹ National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016) at 4.

⁵⁰ William L Ury, Jeanne M Brett and Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, Cambridge, MA, first published 1988, 1993 ed).

one dominated by interest-based approaches. Accordingly, the authors outline six fundamental DSD principles:⁵¹

- (1) Focusing on interests;
- (2) Building in loop-backs to negotiation;
- (3) Offering low cost rights and power-based processes when interest-based processes fail to resolve the dispute;
- (4) Preventing disputes by building in consultation before and feedback after the dispute resolution process;
- (5) Arranging procedures in a low-to-high-cost sequence; and
- (6) Providing the necessary motivation, skills and resources.

Other DSD practitioners have since expanded on Ury Brett and Goldberg's DSD principles. Their DSD principles are outlined in subsequent models of conflict management. Accordingly, this chapter has reviewed the DSD principles presented in six specific conflict management models identified in the prior literature and consequently derived a set of 14 DSD principles for the purpose of evaluating the tax dispute resolution systems of the four selected jurisdictions in this study. The additional principles included in the set of DSD principles derived include:⁵²

- (1) Involving stakeholders in the design process;
- (2) The inclusion of internal independent confidential neutrals in the system;
- (3) Providing disputants with multiple access points to the system;
- (4) Providing assistance for choosing the most appropriate process;
- (5) Providing disputants with the right to choose a preferred process;
- (6) Having a system which is fair and perceived as fair;
- (7) Support of the system by top management;
- (8) Alignment of the system with the mission, vision and values of the organisation;
and
- (9) The inclusion of evaluation of the system.

This chapter then reviews two studies in the literature which utilise DSD principles in evaluating the effectiveness of the design of tax dispute resolution systems. The studies by Bentley and Mookhey both utilise Ury, Brett and Goldberg's six DSD principles in evaluating the ATO's complaint handling procedures and tax dispute resolution procedures, respectively. Set against this background, this present study seeks to expand on Bentley and Mookhey's

⁵¹ At 42.

⁵² See Constantino and Merchant, above n 30; Rowe, above n 1; Slaikeu and Hasson, above n 31; Jennifer F Lynch *CCRA: Contemporary Conflict Resolution Approaches* (Canada Customs and Revenue Agency, Ottawa, 1998); Society of Professionals in Dispute Resolution *Designing Integrated Conflict Management Systems: Guidelines for Designers and Decision Makers in Organizations* (Washington DC, 2001).

research through evaluating the effectiveness of the design of the tax dispute resolution systems of a larger number of jurisdictions and through utilising a more comprehensive range of DSD principles in the jurisdictions' analyses. Henceforth, the next chapter outlines the research methods employed for achieving these objectives.

Chapter 3: Research Methodology

3.1 Introduction

This chapter presents the research methodology for this study. The research framework and methodological approaches employed are outlined in section 3.2. Guided by the principles of pragmatism, this social-legal study incorporates doctrinal legal analysis (discussed in section 3.3), comparative case study analysis (discussed in sections 3.4 and 3.5) and semi-structured interviews (discussed in sections 3.6). Multiple approaches have thus been adopted in order to meet the different objectives of this study. Section 3.7 provides a chapter summary.

3.2 Research Framework and Methodological Approaches

This study constitutes socio-legal research that evaluates the design of tax dispute resolution systems (which lie within existing legal frameworks) of a number of selected jurisdictions and subsequently provides recommendations for best practice in tax dispute systems design (DSD) principles. Salter and Mason note the difficulties in providing a single and conclusive definition of the nature and scope of socio-legal studies.¹ This stems from the sheer diversity of projects and types of research that can be conducted within this tradition, including the deployment of a broad range of research methods.² Nevertheless, what binds the socio-legal research community is an approach to the study of legal phenomena which is multi or inter-disciplinary in its approach and which is said to remedy the difficulties created by the increasingly apparent gap between “law in books” and “law in action.”³ The theoretical perspectives and methodologies in socio-legal research are largely but not exclusively informed by research undertaken in many other social science disciplines.

It follows that the overarching research framework guiding this thesis is pragmatism. Pragmatists freely choose the methods, techniques and procedures that best meet the needs and purposes of the research.⁴ They are neither purists nor polarised between the differences of different research paradigms (that is, between the two extremes of positivism⁵ and interpretivism⁶). Hence, Onwuegbuzie and Leech consider the research of pragmatists to be

¹ Michael Salter and Julie Mason *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education, Harlow, 2007) at 180.

² At 180.

³ At 177.

⁴ Margaret McKerchar *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Pyrmont, 2010) at 79.

⁵ The positivism approach views the world as objective realism and therefore suggests that knowledge is created by deductive reasoning whereby a precise and systematic process is adopted leading to the identification of causal relationships, logical conclusions and the making of predictions according to various confidence levels: at 72.

⁶ The interpretivist approach views the world based on the researcher’s interpretation, which may be influenced by his or her own views, beliefs, experiences and existing knowledge. Interpretivism is based on inductive

more productive and the results likely to be taken more seriously.⁷ The research frameworks of pragmatism (and critical realism) are typically apparent in methodological approaches that use mixed methods drawn from different research frameworks in seeking to find the best, and probably true, answers.⁸ However, critical realists typically use at least one empirical method (for example, surveys or experiments), while pragmatists are less concerned about empirical reality and, as stated above, will freely choose the methods that best meet the needs and purposes of the research.⁹

Accordingly, in line with the pragmatism research paradigm, this study utilises doctrinal legal analysis (black letter law analysis), comparative analysis and semi-structured interviews in order to meet the different objectives of the research. Through case studies of the four selected jurisdictions, doctrinal legal analysis and comparative analysis have been used to describe the four jurisdictions' tax dispute resolution systems, and evaluate and compare the jurisdictions' tax dispute resolution systems using DSD principles. Applying inductive reasoning to the above analysis, general guidance in best practice tax DSD principles has consequently been derived. Semi-structured interviews have then been used to obtain external feedback from New Zealand (NZ) stakeholders on the tax DSD guidance developed and to consider whether adaptation of the tax DSD guidance is required in the NZ context.

3.3 Black Letter Law Approach

As noted in section 3.2 above, this research incorporates a black letter law approach to research. Salter and Mason state that:¹⁰

Black-letter modes of dissertation research aim to reduce the study of law to an essentially descriptive exposition of the meaning for lawyers of a large number of technical and coordinated rules contained in 'primary sources' (mainly cases and statutes).

They further suggest that the typical black letter approach is best defined as a research methodology that "concentrates on seeking to provide a detailed and highly technical commentary upon, and systematic exposition of, the content of legal doctrine."¹¹ This doctrine

reasoning and does not provide a hard and fast explanation from which causal relationships can be identified and predictions made: at 75.

⁷ Anthony J Onwuegbuzie and Nancy L Leech "On Becoming a Pragmatic Researcher: The Importance of Combining Quantitative and Qualitative Research Methodologies" (2005) 8 Int J Soc Res Methodol 375 at 384.

⁸ John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd ed, Sage, Thousand Oaks, 2003) at 12.

⁹ McKerchar, above n 4, at 168.

¹⁰ Salter and Mason, above n 1, at 49.

¹¹ At 49.

is interpreted as if it is a separate, independent and coherent “system of rules”.¹² The priority is to gather, organise and describe legal rules, and offer commentary upon the emergence and significance of the authoritative legal sources that contain these rules, especially cases. Along similar lines McKerchar states that:¹³

Doctrinal research is ... typified by the systematic process of identifying, analysing, organising and synthesising statutes, judicial decisions and commentary. It is typically a library-based undertaking, focused on reading and conducting intensive, scholarly analysis.

As a methodological approach doctrinal research is generally appropriate where the aim of the research is to determine the meaning of a particular legal provision in accordance with the philosophy of legal positivism.¹⁴ This type of research may or may not include hypotheses (consistent with deductive reasoning), but in this case hypotheses are more akin to propositions than hypotheses that typify quantitative research, and therefore can be accepted or rejected in accordance with empirical investigation.¹⁵ McKerchar further states that the scope of doctrinal research is typically narrow and any policy or societal implications of the law are excluded.¹⁶ However, this present study does consider various implications in relation to the strengths and weaknesses in the design of selected tax dispute resolution systems. Hence, a pure black letter law approach has not been adopted.

In spite of the fact that doctrinal legal research is still regarded as the norm by legal researchers, there is evidence of a softening of the traditional boundaries.¹⁷ This is said to be attributed to a growing recognition that law is a social construct and does not exist within a doctrinal vacuum.¹⁸ Nonetheless, the black letter law approach is considered relevant to this study in the respect that the tax dispute resolution systems which this study describes and evaluates (through identifying, analysing, organising and synthesising information), lie within existing legal frameworks. However, it is not the purpose of this research to change these legal frameworks. Rather, this research, inter alia, gives consideration to possible improvements to the design of the tax dispute resolution systems examined within these frameworks (and which

¹² At 49.

¹³ Margaret McKerchar “Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation” (2008) 6 EJTR 5 at 18-19.

¹⁴ McKerchar, above n 4, at 115.

¹⁵ At 115.

¹⁶ At 115.

¹⁷ At 116.

¹⁸ Terry Hutchinson *Researching and Writing in Law* (3rd ed, Thompson Reuters, Sydney, 2010) at 7.

could ultimately necessitate legislative changes). Furthermore, notwithstanding that it is not the purpose of this study to reform the law per se, McKerchar argues that:¹⁹

... it is difficult to imagine that in putting forward a convincing argument for legal reform ... the researcher will not provide some element of doctrinal research, even if only to demonstrate that the existing law is deficient.

3.4 Comparative Approach

This study also employs a comparative approach to the conduct of dissertation research. Thuronyi states that comparative law involves the study of basic structures, country differences, and the influence of systems on each other.²⁰ It identifies underlying patterns and analyses how different rules function in different countries to resolve similar problems. Raw material for this study is a descriptive understanding of different countries' laws.²¹ Along similar lines, Salter and Mason state that comparative research "asks how different legal systems and legal cultures have addressed problems that our law faces but in a different way, and with what degree of perceived success or failure."²²

For law reform, comparative study can canvass the rules that apply in different countries in the subject area being considered and can discuss whether these rules represent good policy and how policymakers might go about deciding what rules to enact for their country.²³ The purpose of a comparative approach is to learn about new possibilities from studying actual practice, to convince by example, and to avoid reinventing the wheel.²⁴ As stated in section 3.3 above, it is not the purpose of this study to reform existing legal frameworks. However, law reform may ultimately occur if certain changes are made to the tax dispute resolution systems in this study.

Nevertheless, this study adopts a comparative approach in the respect that it compares the tax dispute resolution procedures of different jurisdictions utilising a comparative case study methodology. Similarities and differences in the effectiveness of the design of the tax dispute resolution systems of four selected jurisdictions, as evaluated using the DSD principles drawn from the prior literature, are identified and compared. The consequent purpose of the comparison of the DSD evaluations is to develop and recommend a set of best practice tax DSD principles that can be used by tax authorities in either developing new or improving existing tax dispute resolution systems.

¹⁹ McKerchar, above n 4, at 116

²⁰ Victor Thuronyi *Comparative Tax Law* (Kluwer Law International, The Hague, 2003) at 3.

²¹ At 3.

²² Salter and Mason, above n 1, at 183.

²³ Thuronyi, above n 20, at 4.

²⁴ At 4.

Comparative law scholars have divided countries into families to indicate broad similarities in legal traditions.²⁵ Thuronyi states that this type of analysis is useful for tax law as well, because it can impart structure to cross-country comparisons.²⁶ As already discussed in chapter 1, section 1.5 of this thesis, the four jurisdictions in this study (NZ, Australia, the United Kingdom (UK) and the United States (US)) all have a common legal heritage based on the common law.²⁷

3.5 Case Study Approach

3.5.1 Overview

As stated in section 3.2 above, a case study approach has been adopted in this research in order to achieve the objectives of evaluating the effectiveness of the design of the current tax dispute resolution systems of the four selected jurisdictions using DSD principles and consequently developing general guidance in tax DSD principles. Creswell states that a case study allows researchers to explore “in depth a program, an event, an activity, a process, or one or more individuals.”²⁸ The case(s) are “bounded by time and activity, and researchers collect detailed information using a variety of data collection procedures.”²⁹ Yin further explains that:³⁰

The distinctive need for case studies arises out of the desire to understand complex social phenomena ... the case study allows an investigation to retain the holistic and meaningful characteristics of real-life situations such as ... organizational and managerial processes.

The main purpose of a case study is to draw analytical generalisations to theoretical propositions. The analytical generalisations and theoretical propositions made in a case study are in the context of the subjects or cases studied, thus there is no “sample” as would be expected in quantitative research.³¹ Instead, there are multiple sources of evidence collected in accordance with a set of predetermined procedures or a defined protocol.³²

A case study design may be of either a single unit or multiple units. A single unit case study may be justifiable where the case represents (a) a critical test of existing theory, (b) an extreme or unusual circumstance, or (c) a common case, or where the case serves a (d) revelatory or (e)

²⁵ At 7.

²⁶ At 7.

²⁷ Excepting the US state of Louisiana where state law is based on French and Spanish civil law. However, federal laws in Louisiana are based on common law.

²⁸ Creswell, above n 8, at 15.

²⁹ At 15.

³⁰ Robert K Yin *Case Study Research: Design and Methods* (5th ed, Sage, Thousand Oaks, 2014) at 4.

³¹ McKerchar, above n 4, at 103.

³² At 103.

longitudinal purpose.³³ Thus, single unit case studies are generally more suited to the revelation of information or the formulation of theories.³⁴ In contrast, a multiple unit study may be appropriate where the researcher deliberately chooses contrasting situations to study comparatively.³⁵ For example, this would be appropriate where the researcher wanted to investigate the outcomes of different programs, events or activities according to location.³⁶ Given that this study aims to evaluate and compare the effectiveness of the design of four selected jurisdictions' tax dispute resolution systems using DSD principles, a multiple unit case study is appropriate. The units of analysis in this study comprise of the current tax dispute resolution systems in the four jurisdictions selected.³⁷ Figure 3.1 provides a diagrammatic representation of Yin's case study methodology when a multiple unit strategy is adopted.

³³ Yin, above n 30, at 56.

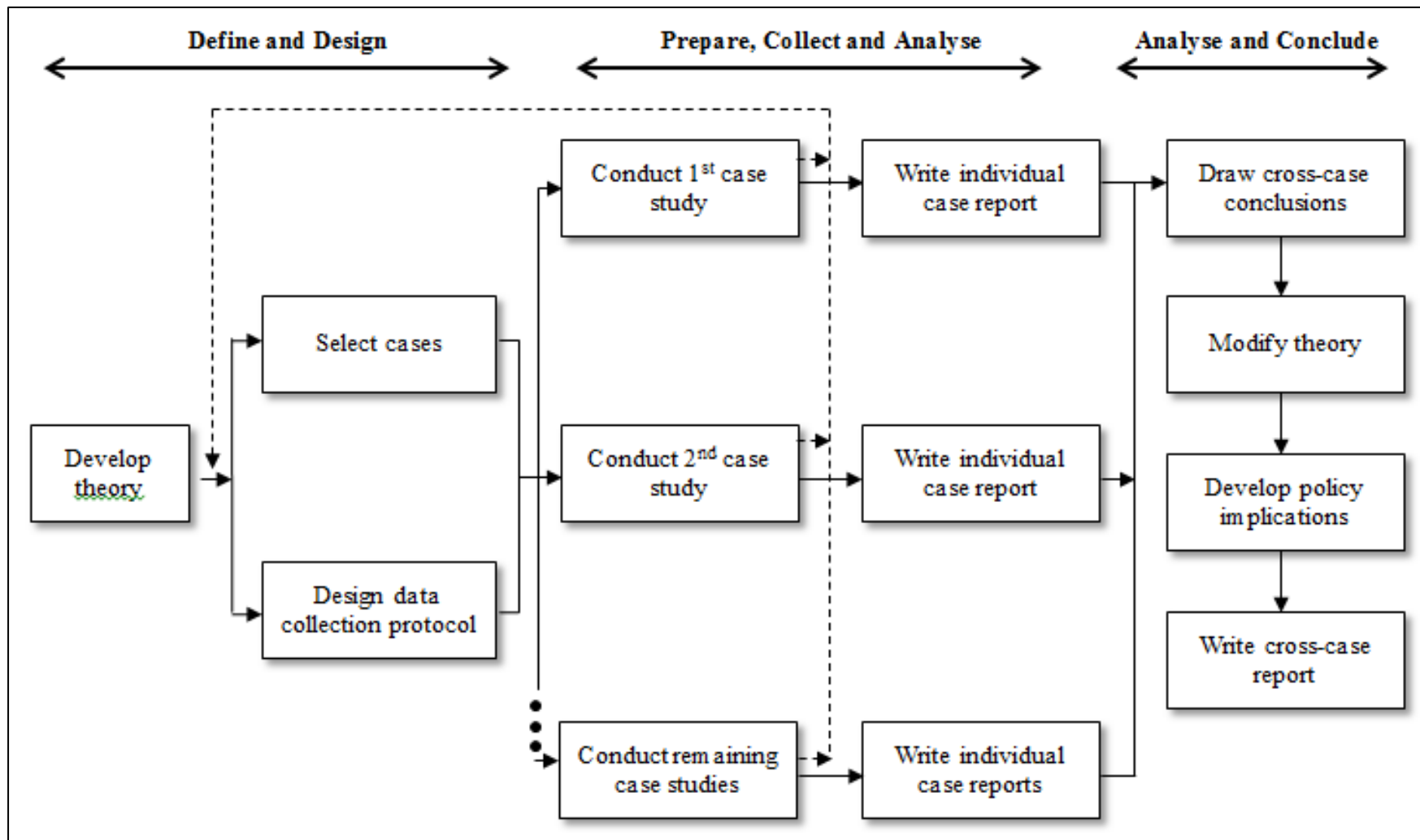
³⁴ McKerchar, above n 4, at 103.

³⁵ At 105.

³⁶ At 105.

³⁷ See chapter 1, section 1.5 of this thesis, for the rationale for the four jurisdictions selected.

Figure 3.1: Multiple Unit Case Study¹



¹ Robert K Yin *Case Study Research: Design and Methods* (5th ed, Sage, Thousand Oaks, 2014) at 60, Figure 2.5.

3.5.2 Case study evidence

Yin identifies six sources of evidence commonly used in case study research:¹

- (1) documentation;
- (2) archival records;
- (3) interviews;
- (4) direct observations;
- (5) participant-observation; and
- (6) physical artifacts.

Each source of evidence has associated strengths and weaknesses as outlined in Table 3.1. Yin states that: “Except for studies of preliterate societies, documentary information is likely to be relevant to every case study topic.”² Sarankatos identifies the role of documentary evidence in “descriptive-comparative research” in which “documents are studied to describe the event in question and, using the information available, to facilitate inter- or intra-cultural comparisons as well as comparisons over time.”³ Accordingly, in this study documentary information is used in order to describe the tax dispute resolution procedures of the four selected jurisdictions and to facilitate the analysis and comparison of the dispute resolution procedures.

¹ Robert K Yin *Case Study Research: Design and Methods* (5th ed, Sage, Thousand Oaks, 2014) at 105.

² At 105.

³ Sotoirios Sarantakos *Social Research* (Macmillan Education, Melbourne, 1993) at 207.

Table 3.1: Six Sources of Evidence Used in Case Study Research – Strengths and Weaknesses⁴

Source of Evidence	Strengths	Weaknesses
Documentation	<ul style="list-style-type: none"> -Stable – can be reviewed repeatedly. -Unobtrusive – not created as a result of the case study. -Exact – contains exact names, references, and details of an event. -Broad coverage – long span of time, many events, and many settings. 	<ul style="list-style-type: none"> -Retrievability – can be difficult to find. -Biased selectivity, if collection is incomplete. -Reporting bias – reflects (unknown) bias of any given document’s author. -Access – may be deliberately withheld.
Archival Records	<ul style="list-style-type: none"> -Same as those for documentation. -Precise and usually quantitative. 	<ul style="list-style-type: none"> -Same as those for documentation. -Accessibility due to privacy reasons.
Interviews	<ul style="list-style-type: none"> -Targeted – focuses directly on case study topics. -Insightful – provides perceived causal inferences and explanations. 	<ul style="list-style-type: none"> -Bias due to poorly articulated questions. -Response bias. -Inaccuracies due to poor recall. -Reflexivity – interviewee gives what interviewer wants to hear.
Direct Observation	<ul style="list-style-type: none"> -Reality – covers events in real time. -Contextual – can cover the case’s context. 	<ul style="list-style-type: none"> -Time-consuming. -Selectivity – broad coverage difficult without a team of observers. -Reflexivity – event may proceed differently because it is being observed. -Cost – hours needed by human observers.
Participant-observation	<ul style="list-style-type: none"> -Same as those for direct observations. -Insightful into interpersonal behaviour and motives. 	<ul style="list-style-type: none"> -Same as those for direct observations. -Bias due to participant-observer’s manipulation of events.
Physical Artifacts	<ul style="list-style-type: none"> -Insightful into cultural features. -Insightful into technical operations. 	<ul style="list-style-type: none"> -Selectivity. -Availability.

⁴ Yin, above n 1, at 106, Figure 4.1.

Documentary evidence can take a variety of forms, including:⁵

- letters, memoranda, email correspondence, and other personal documents, such as diaries, calendars and notes;
- agendas, announcements and minutes of meetings, and other written reports of events;
- administrative documents, such as proposals, progress reports, and other internal records;
- formal studies or evaluations related to the case which is being studied; and
- news clippings and other articles appearing in the mass media or in community newspapers.

These and other types of documents are all increasingly available through Internet searches.⁶ While documentary research has the advantages of convenience, low cost and replication, Yin cautions that “the casual investigator may mistakenly assume that all kinds of documents ... contain the unmitigated truth.”⁷ In fact, important in reviewing any document is to understand that it was “written for some specific purpose and some specific audience other than those of the case study being done.”⁸ In this sense, the researcher is a “vicarious observer”, because the documentary evidence reflects a communication among other parties attempting to achieve some other objectives.⁹ Notwithstanding the above limitations of documentary information used in case study research, it is considered to be the most applicable source of information for the purposes of this study given its broad coverage.

3.5.3 Reliability and validity of case study evidence

Yin suggests three principles that can be used to improve the validity and reliability of case study (including documentary) evidence.¹⁰ These principles are described below:

- (1) Use multiple sources of evidence in order to provide “converging lines of inquiry” or data triangulation;

⁵ At 106.

⁶ At 107. However, there are also limitations associated with information obtained from the Internet, as over time websites can be modified, move location or cease to exist. The availability of information from the Internet may also be restricted as some documents may be confidential. See Jashim U Ahmed “Documentary Research Method: New Dimensions” (2010) 4 IJMSS 1 at 10.

⁷ Yin, above n 1, at 108.

⁸ At 108.

⁹ At 108.

¹⁰ At 118-128.

- (2) Create a case study database (a formal assembly of evidence distinct from a final case study report). The database may include notes, documents, tabular material and narratives; and
- (3) Maintain a chain of evidence which will help to establish high reliability of the data since it allows the reader to follow the line of thought through all steps of the argument. Citation and presentation of information in a structured and systematic way makes this task easy and the evidence convincing.

Arguably, one of the most significant principles in relation to this study is principle 1. In this study, the main source of documentary information on the current tax dispute resolution systems of the four selected jurisdictions was the material obtained from the websites of the respective revenue authorities (including revenue authority practice statements and other guidance). Other sources of information, including primary sources of information (legislation) and secondary sources of information such as academic journal articles, formal reports and Master Tax Guides (or equivalent commentaries),¹¹ where relevant, from each jurisdiction were also utilised. In addition, the documentary evidence included responses received to official information requests made to revenue authorities and other agencies, and email correspondence with revenue authority representatives, tax practitioners and other stakeholders in the four jurisdictions. The main purpose of these forms of correspondence was to enable the researcher to seek clarification of certain details and/or obtain additional information. Thus, multiple sources of documentary evidence were used in this study in order to provide “converging lines of inquiry”.

In line with Yin’s principle 2, the documentary information collected was organised in a database and grouped by jurisdiction. A record of all email correspondence and official information requests was also kept by the researcher. Following Yin’s principle 3, the researcher used appropriate citation and referencing of the documentary evidence utilised in the multiple unit case study in order to increase the reliability of the information through maintaining a chain of evidence.

3.5.4 Case study conduct

Sarankatos outlines that the study of documents is generally accomplished in the following stages:¹²

- (1) Identification of the relevant documents;
- (2) Organisation and analysis of the documents;

¹¹ Where applicable, CCH Master Tax Guides were utilised in this study as they are published and updated annually in a large number of jurisdictions around the world (including in the four jurisdictions in this study).

¹² Sarankatos, above n 3, at 207.

- (3) Evaluation of the information; and
- (4) Interpretation of the data.

Applying Sarankato's guidelines, the documentary research in this study was carried out in the following manner:

(1) Identification of the relevant documents

As outlined in section 3.5.3 above, the relevant documents were drawn from the websites of the tax administrations of the four selected jurisdictions and other applicable websites. Legislation, academic journal articles, formal reports and Master Tax Guides, where applicable, from each jurisdiction were further drawn from. Official information requests and email correspondence with representatives from revenue authorities and tax practitioners in the four selected jurisdictions were also utilised.

(2) Organisation and analysis of the documents

Reading and note taking of the relevant documents was undertaken. Detailed descriptions of the current tax dispute resolution systems in each of the four jurisdictions were then produced in line with the black letter law approach outlined in section 3.3 above. The descriptions of the tax dispute resolution systems included the following components, where applicable: the formal dispute resolution process (including the internal and external review of decisions); alternative dispute resolution (ADR) processes (including revenue authority ADR programs and ADR processes used at the litigation stage of tax disputes); and other dispute resolution initiatives of the tax authority (for example, dispute policies and dispute management plans). The full descriptions of the tax dispute resolution systems were reviewed by selected taxation academics (who had an in-depth knowledge of their jurisdiction's tax dispute resolution procedures) from each of the four jurisdictions, to confirm their accuracy and completeness.¹³

It should be noted that only brief descriptions of the basic steps of the dispute resolution procedures of the four jurisdictions are provided in chapters 4 and 5 as the main focus of the case studies is on the DSD evaluations of the dispute resolution procedures. However, for the further reference of the reader, the in-depth descriptions of the dispute procedures and their related features are provided in Appendix 1 of this thesis. This appendix is intended to provide a background context as well as evidentiary material for the DSD evaluations conducted through outlining the tax dispute resolution systems generally in place in the four jurisdictions up until 30 November 2016. It further provides a source of references for interested readers to obtain additional information on the four jurisdictions' tax dispute resolution systems and their related features. This may be of particular use for readers who are not familiar with the tax

¹³ The descriptions of the tax dispute resolution procedures for NZ and the US were also discussed in-person with the researcher following the reviews conducted by the taxation academics of these two jurisdictions.

dispute resolution systems in any of the four jurisdictions under study and may also prevent the duplication of research efforts.

(3) Evaluation of the information

The effectiveness of the designs of the four jurisdictions' tax dispute resolution systems described in Stage 2 were evaluated using the DSD principles outlined in chapter 2, section 2.7 of this thesis.

(4) Interpretation of the data

In accordance with the comparative approach outlined in section 3.4 above, similarities and differences in the effectiveness of the designs of the tax dispute resolution systems across the four jurisdictions, as evaluated using the selected DSD principles, were identified and compared in a cross-case analysis. The findings were summarised in tabular form and the themes which emerged in the cross-case analysis formed the basis for developing best practice guidelines in tax DSD principles for tax administrations.

Stages 1-3 of the documentary research were carried out during the “prepare, collect and analyse” steps of Yin’s case study methodology, while Stage 4 corresponded to the “analyse and conclude” step (see Figure 3.1). Feedback on the best practice tax DSD guidelines developed in Stage 4 was subsequently sought through semi-structured interviews conducted with selected NZ stakeholders. Thus, the case study findings were used to inform the design of the questions contained in the interview guide for the interviews.

3.6 Interviews

3.6.1 Overview

As stated above, following the case studies, this study utilised interviews as a qualitative strategy of inquiry to obtain feedback on the tax DSD guidance from selected stakeholders in NZ. Self-administered survey questionnaires and interviews were both considered for the purpose of obtaining feedback from stakeholders in this study. However, interviews were selected over self-administered survey questionnaires due to the low expected response rate to a survey questionnaire based on past tax survey response rates.¹⁴ In addition, it was not a purpose of this study to draw generalisations from survey findings to a larger population. Interviews were further considered to be a more appropriate method given that, unlike in a survey questionnaire, interviews can allow for the use of probes seeking further description and clarification of issues from participants. Therefore, the interview method potentially

¹⁴ See, for example, Margaret McKerchar “The impact of income tax complexity on practitioners in Australia” (2005) 20(4) ATF 529; Binh Tran-Nam and Stewart Karlinsky *Small Business Law Complexity in Australia* (paper presented to the ATAX International Tax Administration Conference, Sydney, 27-28 March 2008); Philip Lignier “Measuring the managerial benefits of tax compliance: A fresh approach” (2009) 24(2) ATF 117.

allowed for more insight to be drawn from participants than the survey questionnaire method. Other advantages of interviews over self-administered survey questionnaires include fewer incomplete responses and misunderstood questions.¹⁵ The objective of the interviews was to seek stakeholders' views on the general tax DSD guidance developed as well as on how the general tax DSD guidance could be adapted in the context of the NZ tax dispute resolution procedures.

Minichiello, Aroni and Hays explain that the primary focus of an interview is to understand the significance of human experiences, as described from the interviewee's perspective and interpreted by the interviewer.¹⁶ Interviews for the purposes of conducting research in social sciences and related applied fields can generally be classified as structured, semi-structured and unstructured.¹⁷ Roulston provides the underlying criteria of each of these types of interviews in Table 3.2 on the next page.¹⁸ Saunders, Lewis and Thornhill additionally distinguish between standardised and non-standardised interviews and quantitative and qualitative research interviews.¹⁹ Structured interviews are a form of standardised interview where questionnaires based on predetermined and "standardised" or identical sets of questions are used. These interviews are also generally referred to as "quantitative research interviews". Semi-structured and unstructured interviews are forms of non-standardised interviews where the questions asked and their wording vary depending on the flow of the conversation in the particular interview and the knowledge of the respondents and interviewer. These interviews are also generally referred to as "qualitative research interviews."

With reference to Roulston's guidelines in Table 3.2, this study utilised the semi-structured form of interview. In these kinds of interviews, the interviewer refers to a prepared interview guide that includes a number of questions.²⁰ However, the questions are not fixed and after posing each question to the research participant, the interviewer may follow up with probes to elicit further description about what has been said.²¹

¹⁵ William L Neuman *Social Research Methods: Qualitative and Quantitative Approaches* (4th ed, Allyn and Bacon, Boston, 2000); Earl A Babbie *The Practice of Social Research* (9th ed, Wadsworth Thomson Learning, Belmont, 2001).

¹⁶ Victor Minichiello, Rosalie Aroni and Terrence Hays *In-depth Interviewing: Principles, Techniques, Analysis* (3rd ed, Pearson Education, Sydney, 2008) at 11.

¹⁷ Kathryn Roulston *Reflective Interviewing: A Guide to Theory and Practice* (Sage, Thousand Oaks, 2010) at 14-15.

¹⁸ At 14-15.

¹⁹ Mark Saunders, Philip Lewis P and Adrian Thornhill *Research Methods for Business Students* (5th ed, Prentice Hill, Harlow, 2009) at 230.

²⁰ Roulston, above n 17, at 15.

²¹ At 15.

Table 3.2: Range of Interviews²²

Structured Interviews	Semi-structured Interviews	Unstructured Interviews
The interviewer follows scripted questions in a particular sequence.	Interview protocol is used as a guide and questions may not always be asked in the same order; the interviewer initiates questions and poses follow up probes in response to the interviewee's descriptions and accounts.	Both interviewer and interviewee initiate questions and discuss topics.
The interviewee chooses responses from a range of fixed options that are coded quantitatively; responses are provided by the interviewer.	The interviewee selects own terms to formulate answers to questions; responses are guided by the interviewer's questions.	The interviewee selects own terms to participate in free-flowing conversation.
Asymmetrical structure.	Asymmetrical structure.	Possibly less asymmetrical structure.
Data analysed via deductive analysis for hypothesis testing in multivariate studies.	Data analysed via inductive analytic methods for descriptions and interpretations in interpretive studies.	Data analysed via inductive analytic methods for descriptions and interpretations in interpretive studies.

3.6.2 Interview guide development

An interview guide was developed to ensure that the interviews conducted were systematic and appropriately focused on the subject matter. Patton claims that a further advantage of an interview guide is that it helps the interviewer to manage the limited time and resources available in an interview situation.²³ As stated in section 3.5.4 above, the development of the questions in the interview guide was informed by the findings from the case studies. The interview guide was reviewed by an accounting academic experienced in the design and conduct of research and also reviewed by and discussed with an ADR academic. It was then pilot tested by a tax academic/practitioner and an ADR practitioner. All of the above individuals were not subsequently involved as actual interview participants. Changes were made to the interview guide following the reviews of the guide and the pilot tests. This namely included the insertion of question 8 which asked whether the system should recognise the different ethnic backgrounds of taxpayers (as suggested by the ADR practitioner pilot). A copy of the interview guide is contained in Appendix 6 of this thesis.

The interview guide consisted of three parts. The first part sought feedback on the tax DSD principles in the context of tax dispute resolution generally. These questions asked the interviewees for their views on which of the DSD principles that they thought were the most

²² At 14-15, Table 1.1.

²³ Michael Q Patton *Qualitative Research and Evaluation Methods* (3rd ed, Sage, Thousand Oaks, 2002) at 343.

and least important, and to rank the DSD principles in order of importance. The interviewees were also asked whether any modifications, additions or deletions to the DSD principles should be made. The second part of the interview guide sought feedback on the tax DSD principles in the context of tax dispute resolution in NZ. These questions asked the interviewees whether they would make any changes to their earlier ranking of the DSD principles in the context of the NZ tax dispute resolution procedures. They were also asked whether they would make any further changes (modifications, additions and/or deletions) to the DSD principles in the NZ context and if they thought that there were any issues in applying the DSD principles to the existing NZ tax dispute resolution procedures. The third part of the interview guide contained general questions. In this part the interviewees were asked whether the dispute resolution system should recognise the different ethnic backgrounds of taxpayers and lastly, to provide any general comments that they had.

The same interview guide was used across all stakeholder groups interviewed (see section 3.6.3 below for the different stakeholder groups). However, the semi-structured form of interview utilised enabled the researcher to ask further questions as applicable to the different groups of stakeholders.

3.6.3 Sample selection

Purposive sampling was used in selecting the participants for the interview component of this study. Unlike quantitative research which seeks statistical significance through investigating randomly selected large samples, qualitative research usually investigates a purposive and information rich, small sample size that focuses on the context surrounding the knowledge the participants possess.²⁴ The aim of qualitative research is to gain rich and in-depth information from the participants. The focus is on “how the sample or small selection of cases, units or activities illuminates social life.”²⁵ Accordingly, for the purposes of this study, stakeholders were purposively selected from the following groups of interest:

- (1) Tax practitioners;
- (2) Tax academics;
- (3) ADR practitioners;²⁶
- (4) ADR academics;

²⁴ Neuman, above n 15, at 196.

²⁵ At 196.

²⁶ As noted in chapter 2, section 2.4 of this thesis, DSD is an area of professional practice that is not currently identified with a single profession. Rogers, Bordone, Sander and McEwen note that dispute system designers are “typically individuals who have some background in conflict resolution and who also possess ... group facilitation skills”: Nancy H Rogers, Robert C Bordone, Frank EA Sander and Craig A McEwen *Designing Systems and Processes for Managing Disputes* (Wolters Kluwer, New York, 2013) at 5. Therefore, for the purposes of this study, the views of ADR practitioners (for example, mediators, arbitrators and adjudicators) will be treated as representing the views of dispute system designers.

- (5) Inland Revenue representatives; and
- (6) Members of the judiciary.

The tax practitioners (consisting of tax lawyers and tax accountants) were firstly selected with the assistance of the New Zealand Law Society (NZLS) and Chartered Accountants Australia and New Zealand (CA-ANZ) as the two main professional bodies in NZ that act for taxpayers and regularly deal with the tax dispute procedures.²⁷ A notice was sent on behalf of the researcher by NZLS to their NZ members, with a repeat notice sent after two weeks.²⁸ A sample of the notice is contained in Appendix 7 of this thesis. The notices briefly outlined the researcher's study and invited those members with experience and/or knowledge of the tax dispute resolution procedures in NZ who were interested in participating in an interview, to contact the researcher at the email address provided. However, the total number of responses received to the notices was low (n = 6).²⁹ A notice was unable to be sent out by CA-ANZ to their NZ members due to there being no electronic newsletter for CA-ANZ in place at that time. Instead, at the researcher's request, the NZ Tax Leader of CA-ANZ emailed a list of 12 prominent NZ tax accountants with experience and/or knowledge of the NZ tax dispute resolution procedures which he thought would be interested in participating in an interview. The email additionally suggested that the tax accountants could also recommend a colleague for participation. Four of the 12 tax accountants emailed by the CA-ANZ NZ Tax Leader subsequently participated in an interview.

Similar to the selection of the tax practitioners, the ADR practitioners were initially selected with the assistance of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and the Association of Dispute Resolvers and the Institute of Arbitrators and Mediators Australia (LEADR & IAMA).³⁰ In NZ the education and training of ADR practitioners can lead to accreditation primarily through AMINZ, LEADR & IAMA and/or NZLS. The accreditation schemes for ADR practitioners in NZ are voluntary and there is no legal impediment to anyone practising as an ADR practitioner that does not satisfy the accreditation requirements. However, for the purposes of this study, only those ADR practitioners with AMINZ, LEADR & IAMA and/or NZLS accreditation were selected given their recognition as the main ADR

²⁷ Other professional bodies such as CPA Australia and the Accountants and Tax Agents Institute of New Zealand (ATAINZ) were not approached for the main reason that they have only a small proportion of members that act for taxpayers and regularly deal with the tax dispute procedures in NZ.

²⁸ The notice to NZLS members appeared in Issue 255 of their electronic *Lawpoints* newsletter on 12 February 2015 and the repeat notice appeared in Issue 257 of *Lawpoints* on 26 February 2015.

²⁹ Of the 6 responses received, 4 participants subsequently agreed to participate in an interview (consisting of 3 tax lawyers and 1 Inland Revenue representative).

³⁰ On 1 January 2015, the former Association of Dispute Resolvers (LEADR) and the Institute of Arbitrators and Mediators Australia (IAMA) integrated together as one ADR organisation, adopting the interim name of LEADR & IAMA. On 4 September 2015, LEADR & IAMA adopted a new name: Resolution Institute. However, the relevant interview participants in this study have been referred to as being accredited members of LEADR & IAMA (where applicable), as this was the name of the body at the time that the interviews were conducted.

professional bodies in NZ.³¹ Accordingly, notices were sent on behalf of the researcher by AMINZ and LEADR & IAMA to all of their NZ members.³² Samples of the notices issued by AMINZ and LEADR & IAMA are provided in Appendix 7 of this thesis. The notices briefly outlined the researcher's study and invited any accredited members who were interested in participating in an interview, to contact the researcher at the email address provided. No responses were received to the AMINZ notice and only 4 responses were received to the LEADR & IAMA notices.³³

Due to the low number of responses received to the notices put out by the professional bodies above, in order to obtain further participants, the researcher contacted a number of tax practitioners and ADR practitioners who had participated in previous research conducted by the researcher on tax disputes mediation. In addition, the researcher conducted a search on Google using key words such as 'tax practitioner New Zealand', 'tax accountant New Zealand', 'tax lawyer New Zealand', 'tax barrister New Zealand', 'dispute resolution practitioner New Zealand', 'ADR practitioner New Zealand' and 'mediator New Zealand' in order to identify a number of prominent NZ tax practitioners and ADR practitioners who the researcher thought might be interested in participating in an interview. These additional practitioners were contacted by the researcher through individual emails inviting them to participate. A sample of the email is provided in Appendix 7 of this thesis. This more targeted approach proved to be more effective in obtaining interview participants than the notices put out by the professional bodies (which essentially facilitated a form of participant self-selection).

The tax academics and ADR academics were selected by the researcher conducting searches on the websites of the eight universities in NZ (Auckland University of Technology, Lincoln University, Massey University, University of Auckland, University of Canterbury, University of Otago, University of Waikato and Victoria University of Wellington)³⁴ for academics specialising in the areas of tax dispute resolution, dispute resolution and/or ADR. In addition, a search on Google using key words such as 'tax lecturer New Zealand', 'tax disputes lecturer New Zealand', 'dispute resolution lecturer New Zealand', 'mediation lecturer New Zealand' and 'ADR lecturer New Zealand' was conducted by the researcher in order to identify other relevant academics that may have been missed in the search of the university websites. Some

³¹ Non-accredited members of AMINZ and LEADR & IAMA (that is, AMINZ affiliate, AMINZ student, LEADR & IAMA associate and LEADR & IAMA student members) were excluded from the sample selection.

³² A separate notice was not sent by NZLS given that the notices issued by NZLS were to all its members and thus, included the NZLS accredited ADR practitioners. The notice to AMINZ members appeared in the February 2015 issue of the electronic *AMINZ Newsletter* on 9 February 2015. The notice to LEADR & IAMA members was sent as an email to all NZ members on 9 February 2015 and a repeat notice on 23 February 2015. The notice also appeared in the February 2015 edition of LEADR & IAMA *Pulse* electronic newsletter on 27 February 2015.

³³ Of the 4 responses received, 2 participants subsequently agreed to participate in an interview.

³⁴ These eight institutions meet the definition of a university as defined under section 162 of the Education Act 1989. Given the specialist nature of the thesis topic, other tertiary institutions in NZ were not included in the searches on Google for academics conducted by the researcher.

academics in the area of tax dispute resolution were also recommended by the researcher's supervisors. The selected academics were sent individual emails inviting them to participate in an interview (see Appendix 7 of this thesis for a sample of the email).

A member of Inland Revenue was recruited as an interview participant as a result of being a respondent to one of the NZLS notices. A subsequent Inland Revenue member was recruited on the recommendation of the first Inland Revenue member. This effectively was a form of snowball sampling.³⁵

The members of the judiciary were selected by a search conducted by the researcher on the Westlaw NZ database using the key words 'tax disputes' in the free text field box. The search was filtered by 'Judgement Date' with the years 2011 to 2015 inclusive selected in order to ensure that the members of the judiciary selected would have current knowledge on the tax dispute resolution system in NZ. The search was then filtered by 'Judge Name' in order to identify members of the judiciary who had heard the highest number of tax cases. This was to ensure that the members of the judiciary most experienced in tax dispute resolution could be selected. The researcher then contacted the relevant courts in order to obtain the email addresses for the selected judges. However, responses were received from the courts, on behalf of the selected judges, stating that "judges do not generally take part in such interviews." However, two judges who had additionally been directly emailed a letter by the researcher, both agreed to participate. A sample of the letter to the two judges is contained in Appendix 3 of this thesis.

In determining the appropriate sample size in qualitative inquiry, Patton argues that:³⁶

There are no rules for sample size in qualitative inquiry. Sample size depends on what you want to know, the purpose of the inquiry, what's at stake, what will be useful, what will have credibility, and what can be done with available time and resources.

The above argument implies that there are no specific guidelines to determine sample size in qualitative studies and several factors such as richness of information, available time and resources, guide researchers in deciding the appropriate sample size. However, one approach in determining the appropriate sample size in a qualitative study suggested in the literature is the concept of data saturation (developed originally for grounded theory studies but applicable to all qualitative research that employs interviews as a data source). Data saturation:³⁷

³⁵ An email was also sent to the Minister of (Inland) Revenue (who was holding the position at the time that the interviews for this study were conducted) inviting him to participate in an interview. However, a response was received from his secretary stating that he was not available to participate.

³⁶ Patton, above n 23, at 244.

³⁷ Glenn A Bowen "Naturalistic inquiry and the saturation concept: a research note" (2008) 8 Qualitative Res 137 at 140.

... entails bringing new participants continually into the study until the data set is complete, as indicated by data replication or redundancy. In other words, saturation is reached when the researcher gathers data to the point of diminishing returns, when nothing new is being added.

However, “data saturation is an elusive concept and standard in qualitative research since few concrete guidelines exist.”³⁸ Morse also states: “Saturation is the key to excellent qualitative work ... [but] there are no published guidelines or tests of adequacy for estimating the sample size required to reach saturation.”³⁹ Rather the signals of saturation seem to be determined by “investigator proclamation and by evaluating the adequacy and comprehensiveness of the results.”⁴⁰ In this present study, saturation was unable to be practically operationalised in the following stakeholder groups: tax academics, ADR academics, Inland Revenue representatives and members of the judiciary. This was due to the small number of available and willing participants in these groups. However, for the tax practitioner and ADR practitioner groups, the researcher felt that some data redundancy started to occur after the fifth or sixth interviews in each of these groups.⁴¹ Consequently, in total 30 participants were interviewed, consisting of 13 tax practitioners (made up of 7 tax lawyers and 6 tax accountants),⁴² 3 tax academics, 7 ADR practitioners, 3 ADR academics,⁴³ 2 Inland Revenue representatives and 2 members of the judiciary.

3.6.4 Data collection procedures

Saunders, Lewis and Thornhill outline that interviews can be conducted on a one-to-one basis or as a focus group.⁴⁴ The interviews in this study were conducted with the selected participants on a one-to-one basis. Focus groups were not considered feasible for this study given the difficulties in collaborating together a sufficient number of willing participants. Furthermore, interviews can be conducted with participants face-to-face, over the telephone or electronically via the Internet.⁴⁵ Telephone interviews were considered as a time and cost-effective method for conducting the interviews in this study as the interview participants were from different

³⁸ Bryan Marshall, Peter Cardon, Amit Poddar and Renee Fontenot “Does Sample Size Matter in Qualitative Research?: A Review of Qualitative Interviews in IS Research” (2013) 54 J Computer Info Sys 11 at 11.

³⁹ Janice M Morse “The Significance of Saturation” (1995) 5 Qualitative Health Res 147 at 147.

⁴⁰ At 147.

⁴¹ This finding is consistent with Guest, Bunce and Johnson who suggest a minimum sample of six where the sample is highly homogeneous: Greg Guest, Arwen Bunce and Laura Johnson “How Many Interviews Are Enough?: An Experiment with Data Saturation and Variability” 18 Field Methods (2006) 59 at 78.

⁴² The researcher observed no discernible difference in the views of the tax lawyers and tax accountants.

⁴³ Two of the three ADR academics also held roles as ADR practitioners.

⁴⁴ Saunders, Lewis and Thornhill, above n 19, at 321.

⁴⁵ At 321.

geographic locations in New Zealand.⁴⁶ Moreover, given the nature of their work, the interview participants were typically time-pressured and therefore, compared to face-to-face interviews, telephone interviews were viewed as more convenient for them to partake in. Nevertheless, the researcher acknowledges some of the drawbacks associated with conducting telephone interviews. These include missing the opportunity to witness the nonverbal reactions (body language) of the interview participants which could be important in interpreting the interview findings and the limited time to conduct the telephone interview.⁴⁷ However, the fact that the participants were provided with the interview questions in advance of the interview arguably prepared them for what was going to be asked and therefore, nonverbal reactions may not have been as obvious in this study.

The participants from the six stakeholder groups outlined in section 3.6.3 above, who had expressed an interest in participating in an interview were provided with an information sheet and asked to complete and return (by email) a consent form. Copies of the information sheets and consent forms are provided in Appendix 3 and Appendix 4 of this thesis, respectively. The information sheet explained the objectives of the study and the interview process. Both the information sheet and the consent form requested the participants' consent to audio-record the interview and also outlined that participants would be given the opportunity to review the interview transcripts. The aspects pertaining to the participants' consent to the audio-recording of the interview and the provision of the opportunity to review the interview transcripts were also verbally re-emphasised by the researcher at the start of each interview.

In addition to the information sheet and consent form, a supplementary information document was provided to the participants as reading material in advance of the interview (see Appendix 5 of this thesis). This document contained a brief description of DSD and outlined the researcher's 14 tax DSD principles. The supplementary information document provided to the ADR practitioners and ADR academics also contained a short description of the current NZ tax dispute resolution procedures. This was in order to provide the ADR participants with a background to the NZ tax dispute resolution process so that they could evaluate the tax DSD principles in the context of tax dispute resolution in NZ (for part two of the interview guide) as it was assumed that these participants, in particular, had no (or little) prior knowledge on the current NZ tax dispute resolution procedures. In addition, as noted above, a list of the interview questions (replicating the interview guide) was provided to all of the interview participants prior to the interviews. An additional set of questions focusing specifically on Inland Revenue's dispute resolution procedures was also provided to the two interview participants from Inland Revenue (see Appendix 8 of this thesis). Similarly, an additional set of questions on the tax

⁴⁶ Two face-to-face interviews were conducted. One was with a tax academic from the same university as the researcher and the other was with a tax academic who was visiting the researcher's university during the period in which the interviews were being conducted.

⁴⁷ Saunders, Lewis and Thornhill, above n 19, at 349; Neuman, above n 15, at 272.

dispute resolution procedures in NZ was provided to the two members of the judiciary interviewed (see Appendix 9 of this thesis).

On the return of the consent forms, the interviewees were contacted by the researcher by email to arrange a suitable date and time for the interview. The interviews with the practitioners, academics and the Inland Revenue representatives took place between 14 February 2015 and 17 April 2015 and the interviews with the members of the judiciary were conducted on 21 and 22 July 2015. The interviews took between 11 to 42 minutes to conduct. The average interview time was 28 minutes.

3.6.5 Ethical considerations

All University of Canterbury researchers and research students dealing with human subjects are required to obtain prior approval from the Human Ethics Committee before proceeding with their research (see Appendix 2 of this thesis for the letter of approval). This is to ensure that researchers will conduct their research with appropriate regard to ethical principles and cultural values. An application was lodged with the Human Ethics Committee outlining, inter alia, that the informed consent of the interview participants would be obtained through a signed consent form and the identities of the interview participants would be disguised in any subsequent publications. The measures taken to ensure the secure storage of the interview recordings and transcripts were also outlined. The information sheet and the interview consent form provided to the interview participants informed the participants that ethical clearance had been given by the Human Ethics Committee to undertake the research (see Appendix 3 and Appendix 4 of this thesis). Participants were also able to indicate on the consent form whether they wished to receive a copy of the research results at the end of the project.

3.6.6 Data analysis

Data gathered from the interviews was analysed using thematic analysis, a method which identifies, analyses, and reports the patterns within data. Despite thematic analysis being one of the most common approaches to qualitative analysis, it has been argued that it lacks a clear set of specified procedures or an identifiable approach.⁴⁸ McKerchar also states that “there is no set way of going about theme identification other than for the researcher to review the data and reflect on its meaning.”⁴⁹ Nevertheless, Braun and Clarke consider thematic analysis as a “foundational” method for qualitative analysis due to, inter alia, its flexibility, relative ease of

⁴⁸ Alan Bryman *Social Research Methods* (3rd ed, Oxford University Press, Oxford, 2008); Virginia Braun and Victoria Clarke “Using thematic analysis in psychology” (2006) 3(2) *Qualitative Res Psychol* 77; Richard E Boyatzis *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage, California, 1998).

⁴⁹ Margaret McKerchar *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Pyrmont, 2010) at 232.

application, usefulness in summarising key features of a large body of data and/or providing a “thick description” of the data set, ability to capture similarities and differences across data sets, and ability to generate unanticipated insights.⁵⁰ The thematic analysis in this study was conducted following Braun and Clarke’s six phase guide to performing thematic analysis. The details of the phases are reproduced in Table 3.3.

Table 3.3: Phases of Thematic Analysis⁵¹

	Phase	Description of the Process
1	Data familiarisation	Transcribe data, read and re-read the data, note down initial ideas.
2	Initial code generation	Code interesting features of the data in a systematic fashion across the entire data set; collate data relevant to each code.
3	Search for themes	Collate codes into potential themes; gather all data relevant to each potential theme.
4	Review of themes	Check if the themes work in relation to the coded extracts (Level 1) and the entire data set (Level 2); generate a thematic ‘map’ of the analysis.
5	Defining and naming themes	Ongoing analysis to refine the specifics of each theme, and the overall story the analysis tells; generate clear definitions and names for each theme.
6	Producing the report	The final opportunity for analysis. Selection of vivid, compelling extract examples, final analysis of selected extracts; relate back the analysis to the research question and literature; produce a scholarly report of the analysis.

All six phases of analysis outlined in Table 3.3 were manually conducted by the researcher, including a complete transcription of the interview sessions. Complete transcriptions were utilised following Bertrand, Brown and Ward’s recommendations that utilising the complete transcription approach is appropriate when:⁵²

- (a) the necessary financial and human resources are available;
- (b) the transcriptions can be produced in a reasonable amount of time; and
- (c) the purpose is to obtain accurate, detailed information.

The transcription process took place shortly after each interview and involved the researcher listening to the recordings and writing a verbatim record of everything that was said.⁵³ This

⁵⁰ Braun and Clarke, above n 48, at 97.

⁵¹ Adapted from Braun and Clarke, above n 48, at 87, Table 1.

⁵² Jane T Bertrand, Judith E Brown and Victoria M Ward “Techniques for Analyzing Focus Group Data” (1992) 16 Evaluation Rev 198 at 201.

⁵³ At 200.

was undertaken in conjunction with the notes written by the researcher during the interviews. The full transcripts were then reviewed for accuracy and completeness by the researcher checking the transcripts back against the recordings.⁵⁴ The average time for transcribing (and reviewing) each interview took the researcher between 6 to 8 hours, with a total time spent of over 200 hours.

The transcribed data was divided into relevant codes and the main interview themes were then captured, named and analysed to produce a narrative report of the interview findings. Consequently, the findings were used to suggest potential modifications to the general guidance in tax DSD principles developed from the case studies and further to consider the suggested modifications to the tax DSD principles in the context of the NZ tax dispute resolution process.

3.6.7 Reliability and validity of the interview findings

In order to increase the reliability and validity of the findings from the interviews, the researcher undertook the measures discussed below. LeCompte and Goetz define reliability as “the extent to which studies can be replicated.”⁵⁵ It requires that a researcher using the same methods can obtain the same results as those of a prior study. However, Saunders, Lewis and Thornhill argue that in qualitative research, the findings derived from using non-standardised research methods such as qualitative interviews, are not necessarily intended to be repeatable since they reflect reality at the time they were collected, in a situation which may be subject to change.⁵⁶ As outlined in section 3.6.6 above, in order to increase the reliability of the interview findings, the researcher fully transcribed all of the recordings, repeatedly checked the transcripts during the transcription process and compared the transcripts back against the recordings in order to ensure that there were no obvious mistakes.

Validity or credibility in qualitative research refers to “whether the findings are accurate from the standpoint of the researcher, the participants or the readers of an account.”⁵⁷ One method to determine the validity of a qualitative study is to use member checking (or member validation).⁵⁸ This is a procedure where the researcher submits materials relevant to an investigation for checking by the people who were the source of those materials.⁵⁹ Lewis-Beck,

⁵⁴ Braun and Clarke, above n 48, at 88.

⁵⁵ Margaret D LeCompte and Judith P Goetz “Problems of Reliability and Validity in Ethnographic Research” (1982) 52 Rev Educ Res 31 at 35.

⁵⁶ Saunders, Lewis and Thornhill, above n 19, at 327.

⁵⁷ John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd ed, Sage, Thousand Oaks, 2003) at 195.

⁵⁸ Michael S Lewis-Beck, Alan Bryman, and Tim Futing Liao (eds) *The SAGE Encyclopedia of Social Science Research Methods* (Sage, Thousand Oaks, 2004) at 634.

⁵⁹ At 634.

Bryman and Liao state that “probably the most common form of member validation occurs when the researcher submits an account of his or her findings (such as a short report or interview transcript) for checking.”⁶⁰ Accordingly, as stated in section 3.6.3 above, all interviewees were offered the opportunity to review the interview transcripts to check their correctness and to check for any sensitive information that they wished to be excluded. Seventeen of the interview participants requested a copy of the transcripts to review. One interview participant requested that certain identifying information was removed and one participant subsequently made changes to their ranking of the DSD principles after reviewing their transcript.

A further strategy identified in the research literature which was used to provide qualitative validity was to use “rich, thick descriptions”, involving the extensive use of quotes, to convey the interview findings.⁶¹ Thick descriptions may add to the validity of the findings because through “offer[ing] many perspectives about a theme, the results become more realistic and richer.”⁶²

3.7 Summary

This chapter provides justification for the pragmatism research paradigm and the resulting methodological approaches employed in this study. The pragmatism research paradigm is regarded as appropriate for this study given that it allows the researcher to choose the methods, techniques and procedures which best meet the objectives of the research. Accordingly, through conducting case studies of the tax dispute resolution systems of the four selected jurisdictions, this study employs doctrinal legal analysis and comparative analysis in order to evaluate and compare the effectiveness of the designs of the selected tax dispute resolution systems and subsequently derive guidance in best practice tax DSD principles. The case studies utilise documentary evidence, including material obtained from revenue authorities’ websites and other sources of primary and secondary information, as the most appropriate form of evidence for describing, evaluating and comparing the four selected tax dispute resolution systems.

In addition, this study employs semi-structured interviews in order to obtain feedback on the best practice tax DSD guidance developed and to adapt the DSD guidance in the context of the NZ tax dispute resolution procedures. The interviews are conducted with a total of 30 purposively selected NZ stakeholders from the following groups of interest: tax practitioners, tax academics, ADR practitioners, ADR academics, Inland Revenue representatives and

⁶⁰ At 634.

⁶¹ John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (4th ed, Sage, Thousand Oaks, 2012) at 202.

⁶² At 202.

members of the judiciary. Hence, this chapter has discussed various aspects pertaining to the semi-structured interviews employed, including the development of the interview guide, sample selection, ethical considerations, the data collection and analysis procedures, and the measures taken to increase the reliability and validity of the interview findings.

Against the background of the research framework and methodological approaches provided in this current chapter, chapters 4, 5 and 6 will present the findings from the case studies, and chapters 7 and 8 will present the findings from the semi-structured interviews.

*Chapter 4: Case Study Findings: New Zealand and Australia*¹

4.1 Introduction

For manageability of chapter size, the case studies of the four jurisdictions have been divided into two chapters. New Zealand (NZ) and Australia are grouped together in this chapter as the two Australasian jurisdictions. The United Kingdom (UK) and the United States (US) are grouped together in chapter 5 as the two other (non-Australasian) jurisdictions in this study. As detailed earlier in chapter 3, section 3.5.4, each of the case studies will consist of a brief outline of the jurisdiction's tax dispute resolution procedures which will then be evaluated using the dispute systems design (DSD) principles derived from the prior DSD literature in chapter 2.² Accordingly, section 4.2 of this chapter outlines and evaluates the NZ tax dispute resolution system, section 4.3 outlines and evaluates the Australian tax dispute resolution system, and section 4.4 summarises and compares the two jurisdictions.

Also as outlined in chapter 3, section 3.5.4 of this thesis, the descriptions of the four jurisdictions' tax dispute resolution procedures contained in this chapter and in chapter 5 are intended to provide an outline of the basic elements of the dispute resolution procedures only. This is because the main focus of the case studies is on the DSD evaluations of the tax dispute resolution systems of the four jurisdictions. However, more detailed descriptions of the jurisdictions' tax dispute resolution procedures and their associated alternative dispute resolution (ADR) processes are provided in Appendix 1 of this thesis as a supplementary source of information and references for the reader. The DSD evaluations are conducted on the tax dispute resolution systems generally in place in the four jurisdictions up until 30 November 2016.

4.2 New Zealand

4.2.1 The tax dispute resolution procedures

Tax disputes in NZ typically arise when a taxpayer and Inland Revenue have not reached agreement on an issue following an Inland Revenue investigation or audit. The dispute procedures involve a number of statutorily prescribed and administrative steps as shown in Figure 4.1.³ Part IVA (disputes procedures) of the Tax Administration Act 1994 (TAA 1994)

¹ Material covered in chapter 4 has previously been published in Melinda Jone "Evaluating Australia's Tax Dispute Resolution System: A Dispute System Design Perspective" (2015) 13 EJTR 552 at 559-576 and Melinda Jone "Evaluating New Zealand's Tax Dispute Resolution System: A Dispute Systems Design Perspective" (2016) 22 NZJTL 228 at 238-250.

² To avoid duplication, the full descriptions of each of the 14 DSD principles, outlined in chapter 2, section 2.7, table 2.2 of this thesis, have not been reproduced in this chapter or in chapter 5.

³ A description of the statutory provisions and the administrative steps in the current tax dispute resolution procedures are set out in Inland Revenue "SPS 16/05: Disputes resolution process commenced by the Commissioner of Inland Revenue" (2016) 28(11) Tax Information Bulletin 14 ["SPS 16/05"] and Inland Revenue

prescribes the procedure to be followed in the event of a tax dispute concerning an assessment or other disputable decision.⁴ The main elements of the dispute resolution procedure are:⁵

- A Notice of Proposed Adjustment (NOPA (NZ)) is issued by either the Commissioner of Inland Revenue (NZ Commissioner) or the taxpayer, notifying the other that an adjustment is sought in relation to the taxpayer's assessment, the NZ Commissioner's assessment or other disputable decision;⁶
- A Notice of Response (NOR) rejecting the adjustment in the NOPA (NZ) is issued by the other party;
- The parties voluntarily participate in an Inland Revenue conference to discuss the issues with a view to resolving the dispute;
- A Disclosure Notice is issued by the NZ Commissioner;
- A Statement of Position (SOP) is issued by each party which restates or clarifies the facts, issues and legal arguments relied upon by each party;
- The dispute is referred to Inland Revenue's Disputes Review Unit (DRU (NZ)) for adjudication; and
- If the dispute is decided by the DRU (NZ) in the taxpayer's favour, Inland Revenue have no right of appeal against the decision and the dispute comes to an end. If the dispute is decided in favour of the NZ Commissioner, the taxpayer may challenge the decision in the Taxation Review Authority (TRA) or the High Court.

As indicated in Figure 4.1, Inland Revenue conferences⁷ and adjudication by Inland Revenue's DRU (NZ),⁸ constitute the two administrative phases in the NZ tax dispute resolution procedures. ADR features in the NZ dispute resolution system through the availability of conference facilitation as an option for all taxpayers in the conference phase. ADR processes such as judicial settlement conferences, mediation or other forms of ADR agreed to by the parties, are also potentially available in the TRA and the High Court during the litigation stage.⁹ Also, as shown in Figure 4.1, after the conference phase, in certain limited circumstances, taxpayers can request to opt out of the dispute process and proceed to the High Court or the

"SPS 16/06: Disputes resolution process commenced by a taxpayer" (2016) 28(11) Tax Information Bulletin 50 ["SPS 16/06"].

⁴ A "disputable decision" covers "an assessment; or a decision of the Commissioner under a tax law", except for decisions specifically excluded by the definition in s 3(1) TAA 1994.

⁵ Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH, Auckland, 2012) at 11-12.

⁶ While the NOPA (NZ) can be issued (initiated) by either party, it is most commonly issued by the NZ Commissioner. The tax dispute resolution procedures are generally similar for both NZ Commissioner-initiated and taxpayer-initiated disputes, with some minor differences. For further details, see section 1.1.1 of Appendix 1.1 of this thesis. Figure 4.1 shows the procedure for NZ Commissioner-initiated disputes.

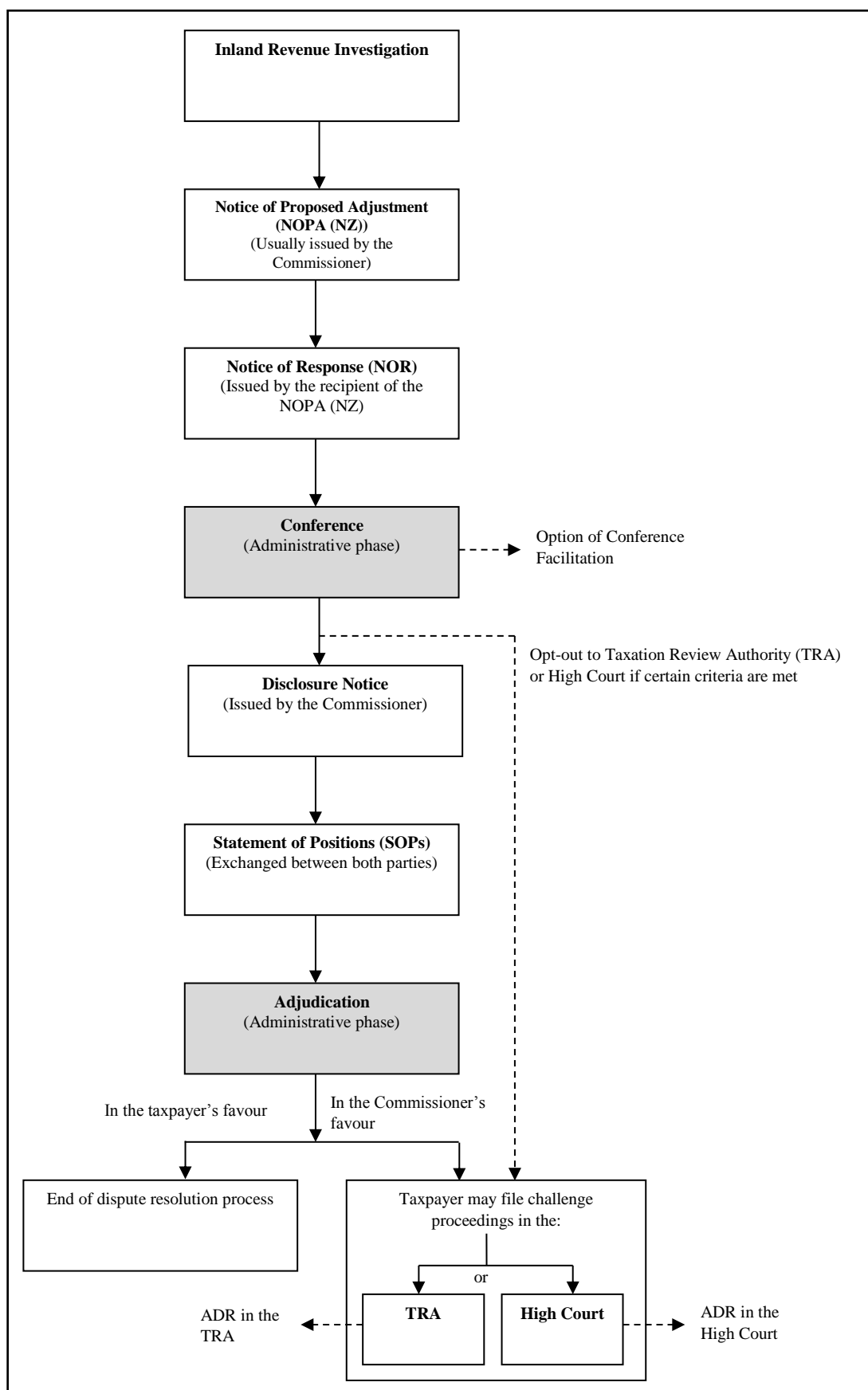
⁷ For further details, see section 1.1.2.1 of Appendix 1.1 of this thesis.

⁸ For further details, see section 1.1.2.2 of Appendix 1.1 of this thesis.

⁹ For further details, see section 1.1.3 of Appendix 1.1 of this thesis.

TRA. A more detailed description of the NZ tax dispute resolution procedures and its related features is provided in Appendix 1.1 of this thesis.

Figure 4.1: The New Zealand Tax Dispute Resolution Procedures



4.2.2 Evaluation using dispute systems design principles

(1) Stakeholders are included in the design process

Stakeholders are included in the design process through reviews of and submissions sought on the tax dispute resolution process. Inland Revenue's Policy and Strategy group (formerly the Policy Advice Division) has released issues papers on proposed legislative and administrative changes to the dispute process and on draft Standard Practice Statements (SPSs). Submissions on these have been sought from stakeholders, through the Policy and Strategy group's website. Chartered Accountants Australia and New Zealand (CA-ANZ)¹⁰ and the New Zealand Law Society (NZLS) are two professional bodies in NZ that regularly deal with the dispute resolution process and who represent taxpayers.¹¹ In particular, they have made a number of prominent joint submissions, including to the Minister of Revenue and the NZ Commissioner, summarising their members' concerns about the dispute process.¹²

With respect to legislative changes to the tax dispute resolution procedures, tax policy in NZ is developed in accordance with the Generic Tax Policy Process (GTPP).¹³ A key feature of the process is that it builds external consultation and feedback into the policy development process, providing opportunities for public comment at several stages. Thus, in developing tax policy in relation to the NZ tax dispute resolution process and its design, Inland Revenue and the NZ Treasury consult with a range of external stakeholders including taxpayers, tax practitioners, professional bodies, tax academics and other parties with an interest in the NZ tax dispute resolution process.

¹⁰ As noted in chapter 1, section 1.5 of this thesis, from 1 July 2014 Chartered Accountants Australia and New Zealand (CA-ANZ) was launched as the new trading name merging the former Institute of Chartered Accountants Australia (ICAA) and New Zealand Institute of Chartered Accountants (NZICA).

¹¹ As noted in chapter 3, section 3.6.3 of this thesis, other professional bodies in NZ whose members deal with the tax dispute resolution process include CPA Australia and the Accountants and Tax Agents Institute of New Zealand (ATAINZ). However, their members' dealings with the NZ tax dispute resolution process are arguably on a less frequent basis.

¹² See, for example, Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, August 2008); Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *Disputes: A Review, July 2010* (Wellington, September 2010); Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants "Submission to the Finance and Expenditure Committee on the Taxation (Tax Administration and Remedial Matters) Bill" (21 February 2011).

¹³ For a further discussion on the operation of the GTPP see Adrian J Sawyer "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation: Some Recent Developments" (1996) 2 NZJTL 17; Adrian J Sawyer "Reviewing tax policy development in New Zealand: Lessons from a delicate balancing of 'law and politics'" (2013) 28(2) ATF 401; Struan Little, Geof D Nightingale and Ainslie Fenwick "Development of Tax Policy in New Zealand: The Generic Tax Policy Process" (2013) 61 Can Tax J 1043.

(2) The system has multiple options for addressing conflict including interests, rights and power-based processes

The NZ tax dispute resolution system has multiple options for addressing conflict. These are outlined below. There is early opportunity for disputes to be resolved through discussion and negotiation with Inland Revenue officers at the investigation stage. As noted in section 4.2.1 above, the formal dispute procedures which follow include the prescribed exchange of documents at certain stages of the procedures as well as administrative steps. Thus, if a dispute cannot be resolved through negotiation, either party may issue a NOPA (NZ) and the responding party will issue a NOR. If the NOR is not accepted in full, an (administrative) conference is called to discuss and, if possible, resolve outstanding issues. A taxpayer may choose for the conference to be facilitated. The facilitated conference option constitutes the sole interests-based ADR process available to all taxpayers in the dispute resolution process prior to the litigation stage. If the dispute remains unresolved following the conference phase, the NZ Commissioner generally issues a disclosure notice and SOPs are exchanged between the parties. Unresolved disputes are then usually referred to Inland Revenue's DRU (NZ), which essentially performs the revenue authority's (administrative) internal review function. In the event that the taxpayer is dissatisfied with the DRU's (NZ) decision, rights-based litigation processes (judicial determination) in the TRA or the High Court may then follow. In addition, interests and rights-based ADR processes are also potentially available as an option for disputes reaching the TRA and the High Court. These ADR processes can include judicial settlement conferences,¹⁴ mediation or another form of ADR agreed to by the parties.¹⁵

(3) The system provides for loops backward and forward

The potential availability of ADR at the litigation stage in the TRA or the High Court may provide a loop-back mechanism from rights-based litigation processes to interests-based processes.¹⁶ Although, the use of ADR in tax disputes in the TRA and the High Court is limited in the respect that, among other things, it requires both parties consent.¹⁷ In practice, in the particular context of tax dispute cases in both the TRA and High Court, anecdotal evidence indicates that judicial settlement conferences appear to have been utilised in some cases.¹⁸

¹⁴ High Court Rules 2016, rr 7.79(1), (3); District Court Rules 2014, r 7.3.

¹⁵ High Court Rules 2016, r 7.79(5); District Court Rules 2014, r 7.2.

¹⁶ If an adjournment of a hearing is sought in order for parties to undertake ADR, the loop-back would be subject to the court's consent.

¹⁷ The option of judicial settlement conferences in the TRA is further restricted by the fact that there is only one TRA judge. Thus, both parties must agree to have the same TRA judge also hearing the dispute.

¹⁸ Email from [redacted] (Tax Barrister, [redacted], Wellington) to Melinda Jone regarding ADR in the TRA and the High Court (7 December 2014). However, the Ministry of Justice's Case Management System (CMS) shows no records of "completed" judicial settlement conferences for tax dispute cases in the High Court after 1 January 2013. Correspondence from General Manager, Higher Courts, Ministry of Justice (22 January 2015) (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

However, private mediation (or other forms of ADR) performed away from the court apparently have not.¹⁹

Loop-forward mechanisms are provided in the form of the opt-out, whereby following the conference phase, the taxpayer may request to opt-out of the remainder of the dispute process and proceed to the TRA or the High Court if certain criteria are met and the NZ Commissioner agrees to the taxpayer's opt-out request.²⁰ Further (limited) loop-forward mechanisms are provided by s 89N(1) TAA 1994 which outlines a number of exceptions where the NZ Commissioner may truncate the full dispute process which must usually be followed, for example, where the NZ Commissioner believes that the taxpayer has committed an offence under an Inland Revenue Act that has the effect of causing delay in the dispute process or where the NZ Commissioner perceives a likelihood of flight by the taxpayer. Parties may also loop-forward under s 89N(3) TAA 1994 if the NZ Commissioner makes an application to the High Court to not complete the full dispute process. The above loop-forward mechanisms are only at the option of the Commissioner, generally where it is perceived that the taxpayer has committed some form of offence and/or there is a risk to the collection of revenue. Hence, these loop-forward mechanisms are not specifically aimed at the efficient resolution of disputes in both parties' interests per se.

(4) There is notification before and feedback after the resolution process

Notification of disputes is implied through Inland Revenue's Charter which sets out how Inland Revenue will work with taxpayers and also outlines that they will inform taxpayers of the options available where a taxpayer disagrees with them.²¹ Inland Revenue's annual compliance programme, *Compliance Focus*, which informs taxpayers of Inland Revenue's areas of focus and what they are doing to address significant issues and behaviours which impact on compliance, also acts as a form of notification.²² It may notify taxpayers of potential risk areas for disputes. Inland Revenue case notes which provide brief summaries of tax decisions made by the TRA, the High Court, Court of Appeal, Privy Council and the Supreme Court and outline

¹⁹ Email from [redacted] (Tax Barrister, [redacted], Wellington), above n 18; Correspondence from General Manager, Higher Courts, Ministry of Justice, above n 18.

²⁰ The former option for taxpayers to elect for matters to be heard in the small claims jurisdiction of the TRA, which was available if the amount of tax in dispute was less than \$30,000 and the taxpayer had made such an election in the NOPA (NZ) or NOR, would have constituted a loop-forward in the procedures (from the point of election to litigation in the TRA). However, the small claims jurisdiction was removed with effect from 29 August 2011 by section 167 of the Taxation (Tax Administration and Remedial Matters) Act 2011.

²¹ Inland Revenue *Inland Revenue's Charter* (IR 614, March 2009) at 1.

²² See Inland Revenue "Our compliance focus" (26 November 2014) <<http://www.ird.govt.nz/taxagents/compliance/>> (last accessed 7 November 2016). Inland Revenue has historically published its annual compliance programme. However, Inland Revenue now provide "tailored information for specific customer groups" as part of its new approach to compliance.

the principal facts and grounds for the decisions may also serve as a form of notification.²³ While Inland Revenue state that these case reviews are purely brief factual reviews of decisions and “do not set out Inland Revenue policy, nor do they represent [Inland Revenue’s] attitude to the decision”,²⁴ arguably they may still provide some indication of Inland Revenue’s view on a tax decision. Notwithstanding the above forms of notification, Inland Revenue does not permit the publication of redacted adjudication reports issued by the DRU (NZ). Adjudication reports represent the NZ Commissioner’s considered view of the law on particular issues and therefore, would be of considerable guidance to taxpayers and their advisers in the conduct of subsequent disputes.²⁵

Feedback occurs at a systemic level through the publication, on Inland Revenue’s website, of a limited range of general statistics which may be relevant to the dispute process, such as outcomes of cases decided by the DRU (NZ) over time and the length of time of cases in dispute.²⁶ Generally limited feedback on tax disputes, in the form of statistics and/or commentaries, appears to occur in Inland Revenue’s annual reports.²⁷ Provision for obtaining feedback at the micro-level on Inland Revenue’s facilitated conferences apparently occurs through a survey form provided to participants at the end of Inland Revenue’s facilitated conference meetings.²⁸

(5) The system has a person or persons who function as internal independent confidential neutral(s)

There is no internal independent confidential neutral that taxpayers can go to for coaching, referring and problem-solving within Inland Revenue. Taxpayers can, however, seek advice and support in relation to dispute resolution externally from professional advisors at their own expense. This would be similar to taxpayers seeking advice and assistance from professional advisors on tax technical matters. If Inland Revenue staff require advice and support in dispute resolution-related matters, they can approach their team leader in the first instance and

²³ Case notes are published in Inland Revenue’s Tax Information Bulletins and are also listed by calendar year on Inland Revenue’s website: Inland Revenue “Legal decisions – case notes” (17 July 2006) <<http://www.ird.govt.nz/technical-tax/case-notes/>> (last accessed 7 November 2016).

²⁴ Inland Revenue, above n 23.

²⁵ Mark Keating and Michael Lennard “Developments in tax disputes – Another step backwards?” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Auckland, 11-12 November 2011) at 26-27.

²⁶ Inland Revenue “Tax data – audits and legal issues” (3 December 2015) <<http://www.ird.govt.nz/aboutir/audit-and-legal-issues/>> (last accessed 7 November 2016).

²⁷ See Inland Revenue’s annual reports, available at: Inland Revenue “Annual report” (5 October 2004) <<http://www.ird.govt.nz/aboutir/reports/annual-report/>> (last accessed 7 November 2016). Contrast with the Australian Taxation Office’s (ATO’s) annual report which typically includes a separate section reporting on “Resolving disputes”. See, for example, Australian Taxation Office *Commissioner of Taxation Annual Report 2015-16* (Canberra, October 2016) at 46-48.

²⁸ Email from [redacted] (Case Director, [redacted], Inland Revenue, Auckland) to Melinda Jone regarding Inland Revenue facilitated conferences (13 January 2015).

managerial assistance is also available if required.²⁹ In addition, the Legal and Technical Services (LTS) and Specialist Advice business units (which are part of Investigations and Advice, which sits within Inland Revenue's Service Delivery group) are also available to provide technical advice and support on dispute resolution-related matters to Inland Revenue staff.³⁰ Accordingly, the above options would constitute the closest equivalents to a person or persons which function(s) as an internal independent confidential neutral for Inland Revenue officers.

(6) Procedures are ordered from low to high cost

The formal NZ tax dispute resolution procedures are technically not ordered in a low to high cost sequence. This is due to the fact that the procedures are made up of various stages involving the prescribed exchange of documents as well as two administrative phases. The prescribed documents and the administrative phases each have different levels of costs associated with them. Anecdotally, the preparation and lodgement of documents including the NOPA (NZ), NOR and SOPs impose high costs on taxpayers. Two prominent NZ tax barristers³¹ generally order the costs of the stages in the current NZ tax dispute procedures from highest to lowest, for taxpayers, as follows: (1) SOPs; (2) NOPA (NZ)/NOR; (3) Inland Revenue conferences; (4) adjudication by the DRU (NZ).

Furthermore, in the context of tax dispute resolution it is usually necessary for taxpayers to have their position worked out from the beginning and for some taxpayers, professional advice may be required from the outset of the dispute. This suggests that in the context of the NZ dispute resolution procedures, the upfront costs incurred by many taxpayers may not greatly differ with the stage of the formal dispute resolution process at which the dispute is ultimately resolved at.

Moreover, commentators and professional bodies have submitted that the current pre-litigation tax dispute resolution process in NZ "has many stages and creates the potential for disputes to go on for long periods of time at significant cost."³² This has resulted in taxpayers (particularly small taxpayers),³³ being "burnt off" by the high costs of pursuing the dispute resolution

²⁹ Correspondence from Group Manager, Investigations and Advice, Inland Revenue (18 August 2014) (Obtained under Official Information Act 1982 Request to Inland Revenue).

³⁰ Correspondence from Group Manager, Investigations and Advice, Inland Revenue, above n 29. See also, Inland Revenue "Legal and Technical Services: Our services and contact details" (31 October 2013) <<http://www.ird.govt.nz/aboutir/who-we-are/structure/tlsg/>> (last accessed 7 November 2016).

³¹ Email from [redacted] (Tax Barrister, [redacted], Auckland) to Melinda Jone regarding costs of the tax dispute process in NZ (12 November 2014); Email from [redacted] (Tax Barrister, [redacted], Wellington) to Melinda Jone regarding costs of the tax dispute process in NZ (12 November 2014).

³² Greg Blanchard "The case for a simplified tax disputes process" (2005) 11 NZJTL 417 at 417.

³³ There is no official definition for a small taxpayer in NZ (or internationally). However, the Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the*

process.³⁴ Thus, the number of steps in the dispute resolution process and the costs associated with pursuing the full process to the litigation stage arguably act as a deterrent to taxpayers and a barrier to social justice.

(7) The system has multiple access points

The formal dispute process is initiated by either the NZ Commissioner or the taxpayer through the issuance of a NOPA (NZ) to the other party. In each of these instances there is only one structural entry point to the formal dispute process for the taxpayer (or the NZ Commissioner). In a dispute initiated by the taxpayer, the taxpayer can only enter the dispute process by issuing a NOPA (NZ) (disputing either their own assessment or an assessment issued by the NZ Commissioner). The NZ Commissioner can therefore, only enter by issuing a NOR rejecting the taxpayer's NOPA (NZ). Similarly, in a dispute initiated by the NZ Commissioner, the NZ Commissioner can only enter the dispute process by issuing a NOPA (NZ) and the taxpayer can only enter by issuing a NOR rejecting a NOPA (NZ) by the NZ Commissioner.

In the procedural respect, a NOPA (NZ) issued by either the NZ Commissioner or the taxpayer must be made using the prescribed form, *Notice of Proposed Adjustment* (IR 770).³⁵ While there is no prescribed form that must be used for a NOR, Inland Revenue provides a template form on its website that may be downloaded and used by taxpayers. There are, however, different ways in which notification of a dispute (that is, a NOPA (NZ) or NOR) may be given by the NZ Commissioner or the taxpayer, including by: personal delivery; post; fax; or electronic means of communication.³⁶ Multiple procedural forms of access to the system for certain taxpayers are also provided in the respect that some Inland Revenue forms and guides (including some which may be relevant to the dispute procedures) are available on Inland Revenue's website in both English and Te Reo Maori.³⁷

With respect to the provision of a choice of access persons to whom system users may approach in the first instance, for taxpayers requiring language support, Language Line, a free phone-

Challenge Procedures in Part VIIIA of the Tax Administration Act 1994, above n 12, at Appendix A, noted: "There are a large number of New Zealand businesses and individuals that are 'small' in tax terms. In New Zealand, 89% of New Zealand enterprises employ five or fewer staff." To date, this percentage has largely remained unchanged. See Statistics New Zealand "Business demography tables" (27 October 2016) <http://www.stats.govt.nz/tools_and_services/nzdotstat/tables-by-subject/business-demography-tables.aspx> (last accessed 7 November 2016).

³⁴ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994*, above n 12, at [2.1(d)]. See also, William Young "Tax disputes in New Zealand" (2009) 4(1) JATTA 1 at 15.

³⁵ Inland Revenue *Notice of Proposed Adjustment* (IR 770, November 2009).

³⁶ TAA 1994, ss 14-14G.

³⁷ See Inland Revenue "Forms and guides" <<http://www.ird.govt.nz/forms-guides/keyword/>> (last accessed 7 November 2016).

based interpreter service can be used for communicating with Inland Revenue.³⁸ Deaf, hearing-impaired or speech-impaired taxpayer can contact Inland Revenue by using the New Zealand Relay Service.³⁹ Additionally, deaf and hearing-impaired taxpayers can also request for a face-to-face meeting with Inland Revenue staff with a New Zealand Sign Language interpreter present. While the above services provide a choice of persons for certain taxpayers to make contact with Inland Revenue generally, they arguably also may serve to provide a choice of access persons for certain taxpayers to approach for the purpose of acquiring information about the dispute resolution system in the first instance.

(8) The system includes training and education for stakeholders

Taxpayers and their advisors are provided with information about the NZ tax dispute resolution procedures through Inland Revenue's website⁴⁰ and through various guides such as *Disputing an assessment*,⁴¹ *Disputing a notice of proposed adjustment (NOPA)*⁴² and *If you disagree with an assessment*.⁴³ In addition, Inland Revenue's SPSs on dispute resolution, SPS 16/05 and SPS 16/06, set out how the NZ tax dispute resolution process operates including the key actions and administrative timeframes for both Inland Revenue staff and taxpayers.⁴⁴ However, Inland Revenue makes it clear that the SPSs are intended only as "a reference guide for taxpayers and Inland Revenue officers."⁴⁵ Moreover, only "where possible" Inland Revenue officers must follow the practices outlined in the SPSs.⁴⁶

Training in dispute resolution is available to Inland Revenue staff where it is identified as part of their development plans.⁴⁷ The training can be delivered by internal and external providers depending on the needs of the individual.⁴⁸ Inland Revenue facilitators currently receive an initial two days of training from the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) with "ongoing refreshers and sessions to compare experiences."⁴⁹ In addition, from

³⁸ Inland Revenue "Contact us" (31 March 2014) <<http://www.ird.govt.nz/contact-us/>> (last accessed 7 November 2016).

³⁹ Inland Revenue, above n 38.

⁴⁰ See Inland Revenue "Disputing an assessment: The disputes resolution process" (3 April 2014) <<http://www.ird.govt.nz/how-to/disputes/changes-disputes.html>> (last accessed 7 November 2016).

⁴¹ Inland Revenue *Disputing an assessment: What to do if you dispute an assessment* (IR 776, April 2012).

⁴² Inland Revenue *Disputing a notice of proposed adjustment: What to do if Inland Revenue disputes your assessment* (IR 777, January 2012).

⁴³ Inland Revenue *If you disagree with an assessment* (IR 778, December 2011).

⁴⁴ See Inland Revenue "SPS 16/05, above n 3; Inland Revenue "SPS 16/06", above n 3.

⁴⁵ Inland Revenue "SPS 16/05", above n 3, at 14; Inland Revenue "SPS 16/06", above n 3, at 50.

⁴⁶ Inland Revenue "SPS 16/05", above n 3, at 14; Inland Revenue "SPS 16/06", above n 3, at 50.

⁴⁷ Correspondence from Group Manager, Investigations and Advice, Inland Revenue, above n 29.

⁴⁸ Correspondence from Group Manager, Investigations and Advice, Inland Revenue, above n 29.

⁴⁹ Email from [redacted] (Director, [redacted], Inland Revenue, Wellington) to Melinda Jone regarding Inland Revenue facilitated conferences (12 May 2015).

the latter half of 2015, Inland Revenue commenced accrediting its facilitators with AMINZ Associate membership.⁵⁰ However, accredited Inland Revenue facilitators are not AMINZ panel members (who are listed on the AMINZ website).

Given that adjudication decisions are generally solely made “on the papers”,⁵¹ the adjudication team in the DRU (NZ) do not receive any specific training in dispute resolution techniques. However, they have legal and/or accounting qualifications and have experience in researching and analysing tax issues which are necessary to perform their adjudication role.

(9) Assistance is offered for choosing the best process

Inland Revenue’s SPS 16/05 and SPS 16/06 provide administrative guidelines and timeframes which can assist Inland Revenue officers and taxpayers as to the appropriate use of processes.⁵² There are no dedicated process advisors per se available within Inland Revenue for the purpose of providing advice on the dispute resolution procedures for Inland Revenue officers and/or taxpayers in a particular dispute.⁵³ This is partly due to the fact that the dispute procedures in Part IVA of the TAA 1994 provides a compulsory code for tax dispute resolution in NZ and thus, prescribes the only process that can be followed. Moreover, the NZ tax dispute procedures does not offer taxpayers optional ADR programs alongside the formal tax dispute resolution process such that taxpayers are able to choose between dispute resolution options. Notwithstanding that there are no specific process advisors, Inland Revenue’s Investigations and Advice group has general oversight of all tax disputes and the Specialist Advice team, sitting within the Investigations and Advice group, administers the facilitated conferences.⁵⁴

(10) Disputants have the right to choose a preferred process

As stated above, the dispute procedures in Part IVA TAA 1994 provides a compulsory code for settling tax disputes. Section 109 TAA 1994 provides that the disputes and subsequent challenge proceedings are the sole methods for contesting the correctness (and arguably the validity) of an assessment. Accordingly, attempts by taxpayers to contest either their assessment or the subsequent tax liability in any other forum is not permitted. Section 89N TAA 1994 further provides that, with limited exceptions, the full dispute process must be completed (that is, it cannot be truncated). Accordingly, there is generally a limited ability for taxpayers (except for the opt-out and certain other instances discussed below) to choose a preferred path in the NZ dispute resolution process. However, it is worth noting that the

⁵⁰ Email from [redacted] (Director, [redacted], Inland Revenue, Wellington) to Melinda Jone regarding Inland Revenue facilitator accreditation (22 January 2016).

⁵¹ See Inland Revenue “SPS 16/05”, above n 3, at [263]; Inland Revenue “SPS 16/06”, above n 3, at [289].

⁵² Inland Revenue “SPS 16/05”, above n 3; Inland Revenue “SPS 16/06”, above n 3.

⁵³ Correspondence from Group Manager, Investigations and Advice, Inland Revenue, above n 29.

⁵⁴ Correspondence from Group Manager, Investigations and Advice, Inland Revenue, above n 29.

conference and adjudication phases are “administratively mandated.”⁵⁵ That is, they are not mandated in legislation and are not compulsory. Although, it is Inland Revenue’s invariable practice that these phases are offered as part of the dispute process and it is “unusual for a taxpayer to refuse to attend.”⁵⁶

The opt-out provides a limited option for taxpayers meeting certain criteria to opt-out of the full dispute process after the conference phase and proceed to the TRA or the High Court. The criteria to opt-out include: where the total amount of tax in dispute is \$75,000 or less; the dispute turns on issues of fact only; the dispute concerns facts and issues that are waiting to be resolved by a court; or the dispute concerns facts or issues that are similar to those that have already been considered by the DRU (NZ) in a past dispute.⁵⁷ The opt-out may arguably also be viewed as a limited means of providing the option to choose a preferred process for small taxpayers (that is, where the core tax in dispute is under \$75,000).⁵⁸ Nevertheless, in practice the opt-out is restricted by the fact that, in addition to meeting the narrow criteria for opting-out, taxpayers must seek the NZ Commissioner’s agreement to opt-out.⁵⁹

In addition to the opt-out, there are some other instances in the NZ tax dispute resolution procedures where taxpayers are provided with the option to choose a preferred process. These instances relate to the option to utilise ADR. For example, taxpayers may choose for a conference to be held with or without a facilitator.⁶⁰ In addition, at the litigation stage in the TRA or the High Court, parties can potentially choose to utilise ADR in the respect that they may consent to the convening of a judicial settlement conference at any time during the hearing of a proceeding,⁶¹ or consent to being directed to private mediation (or another form of ADR agreed to by the parties) at any time before or during the hearing of a proceeding.⁶² However, as the use of ADR in the TRA and the High Court requires the consent of both parties, among

⁵⁵ Keating, above n 5, at 14.

⁵⁶ At 165.

⁵⁷ Inland Revenue “SPS 16/05”, above n 3, at [167] and Inland Revenue “SPS 16/06” above n 3, at [196].

⁵⁸ See Inland Revenue “Taxation (Tax Administration and Remedial Matters) Act 2011: Disputes Process” (5 December 2011) <<http://www.ird.govt.nz/technical-tax/legislation/2011/2011-63/2011-63-disputes-process/>> (last accessed 7 November 2016).

⁵⁹ Inland Revenue “SPS 16/05”, above n 3, at [163] and Inland Revenue “SPS 16/06” above n 3, at [192].

⁶⁰ Inland Revenue “SPS 16/05”, above n 3, at [137] and Inland Revenue “SPS 16/06”, above n 3, at [166]. As at 24 March 2015, approximately 68 per cent of all cases at the conference stage have elected to have conferences facilitated: Telephone correspondence from [redacted] (Director, [redacted], Inland Revenue, Wellington) to Melinda Jone regarding Inland Revenue facilitated conferences (24 March 2015).

⁶¹ High Court Rules 2016, rr 7.79 (3); District Court Rules 2014, r 7.3

⁶² High Court Rules 2016, r 7.79(5); District Court Rules 2014, r 7.2.

other things, the NZ Commissioner's general reluctance to settle in practice limits the choice of taxpayers to utilise ADR in the TRA and the High Court.⁶³

(11) **The system is fair and perceived as fair**

As highlighted in chapter 1, section 1.5 of this thesis, despite a number of reviews and amendments to the current NZ tax dispute resolution procedures since their enactment under Part IVA TAA 1994 in 1996, commentators and professional organisations in NZ have raised various concerns with respect to their operation.⁶⁴ In particular, as noted in DSD Principle 6 above, concerns have been raised that the dispute procedures are too lengthy and costly. As a result taxpayers (particularly small taxpayers) are being "burnt off" and are choosing not to pursue their disputes.⁶⁵ In turn this is arguably adversely impacting on taxpayers' perceptions of the fairness of the procedures and potentially negatively impacting on the tax system and on taxpayer voluntary compliance.⁶⁶ Despite various (largely administrative) changes to the procedures, to date it appears that these views of the NZ dispute resolution procedures have largely remained unchanged.⁶⁷

Various commentators have called for the simplification of the dispute procedures in a number of ways. Virtually all reform proposals recommend abandoning (or making optional) the SOP and adjudication phases of the current procedure.⁶⁸ The desire has been "to free taxpayers from

⁶³ See Michael Lennard "Peace in Our Time: Part 1" (2008) 4 Tax'n Today 29; Michael Lennard "Peace in Our Time: Part 2" (2008) 5 Tax'n Today 16.

⁶⁴ See Keating, above n 5, at 16-20.

⁶⁵ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994*, above n 12, at [2.1(d)].

⁶⁶ At [2.1(d)].

⁶⁷ See, for example, Keating and Lennard, above n 25; Shelley Griffiths "Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process" (paper presented to the Australasian Tax Teachers Association Conference, Sydney, 17 January 2012); Susan Glazebrook "Taxation Disputes in New Zealand" (paper presented to the Australasian Tax Teachers Association Conference, Auckland, 22 January 2013); Lindsey Ng and Chris Cunliffe "Inland Revenue service – are you satisfied?" (2013) 92(1) Chartered Accountant 78; Denham Martin "Honest Taxpayers Need Advocates and Real Rights" (2013) 212 NZLawyer 22; Fred Ward "Changes to the Disputes Resolution Process – A Practitioner's Perspective" (paper presented to the New Zealand Law Society Tax Conference, Auckland, September 2013) 165; Sarah Miles "The Price we Pay for a Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation?" (2015) 46 VUWLR 361; Colmar Brunton *Satisfaction with Inland Revenue: November 2015* (4 November 2015); Alison Pavlovich "The Tax Disputes Process and Taxpayer Rights: Are the Inconsistencies Proportional?" (2016) 22 NZJTL 70; Geoff Clews and Ele Duncan "Audits and Disputes: The Myths, The Realities and The Lessons to be Learnt" (paper presented to the New Zealand Law Society Tax Conference, Auckland, 13 October 2016) 85.

⁶⁸ See, for example, Blanchard, above n 32; Mark Keating "Comment: New Zealand's tax dispute procedure: Time for a change" (2008) 14 NZJTL 425; Joanne Dunne "Re-solving Tax Disputes" (2008) 101 NZLawyer 18; James Peck and Andrew J Maples "Comment: The Tax Disputes Resolution Process in New Zealand: What about the Little Fellas?" (2010) 16 NZJTL 348; Melinda Jone and Andrew J Maples "Mediation as an Alternative Option in New Zealand's Tax Dispute Resolution Procedures" (2012) 18 NZJTL 412; Melinda Jone and Andrew J Maples "Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime" (2013) 19 NZJTL 301; Martin, above n 67.

a lengthy and expensive system which appears to be almost entirely controlled by the IRD.”⁶⁹ Commentators have thus called for more direct access to the courts for taxpayers wishing to contest an assessment or proposed reassessment.⁷⁰

[T]he time and cost of the disputes resolution process appear to have a chilling effect on litigation ... taxpayers ought to be able to elect to go the challenge process, which takes the matter to the TRA or High Court, without being forced to engage in the disputes resolution procedure.

Nevertheless, the NZ Commissioner appears unwilling to modify the current procedures, rejecting calls for reform on the following grounds:⁷¹

Although many concerns have been raised about the administration of the disputes process and how much of the process should be explicitly legislated for there have previously been no serious suggestions that the fundamentals of the process should be revised.

However, as indicated above, taxpayers and practitioners have remained sceptical of Inland Revenue’s “tinkering” with the administration of the procedures.⁷²

The concern with administrative changes is that the Commissioner has argued (successfully) before the Courts that he is not required to follow his own policies and administrative practices, with the consequence that taxpayers no longer have confidence that the Commissioner will adhere to his policies and practices.

With respect to perceptions of fairness of Inland Revenue’s conference facilitation process, there are mixed findings. Inland Revenue indicate that “the initiative has been very successful, with positive feedback from practitioners who have been involved.”⁷³ Campbell and Hendriksen additionally note that “anecdotal evidence suggests that taxpayers have become more comfortable with the way in which Inland Revenue facilitators have generally conducted

⁶⁹ Keating, above n 5, at 20.

⁷⁰ Shelley Griffiths “Tax as Public Law” in Andrew Maples and Adrian Sawyer (eds) *Taxation Issues: Existing and Emerging* (Canterbury Education Printing Services, Christchurch, 2011) 215 at 225.

⁷¹ Inland Revenue *Taxation (Tax Administration and Remedial Matters) Bill – Officials Report to the Finance and Expenditure Select Committee on Submissions on the Bill* (April 2011) at 55.

⁷² Russell McVeagh “Latest Tax Bill proposes changes to the tax disputes procedure and repeal of gift duty” (8 December 2010) <http://www.russellmcveagh.com/Portals/1/Documents/Tax%20Update%20archive/TaxDecember2010_358.html> (last accessed 7 November 2016).

⁷³ Graham Tubb “Tax Disputes Procedures: A Current Snapshot” (paper presented to New Zealand Law Society Tax Conference, Auckland, September 2013) 149 at 154.

themselves.”⁷⁴ Nevertheless, it has also been put forward that “the facilitator, as a senior officer of the Department, may have a natural bias towards the Commissioner.”⁷⁵ Furthermore, it has been observed that the facilitator has generally:⁷⁶

[A]dopted more of a passive role in relation to the dispute than that intended by ... the SPSs ... which place more emphasis on the facilitation role; seeking to find points of agreement and exploring options for settlement.

Hence, various practitioners have suggested that a more pro-active role could be taken by Inland Revenue facilitators to “critically test the position of each side and actively encourage compromises by both parties in attempt to obtain resolution of the dispute” rather than the parties “simply feeling as if they had ‘gone through the motions.’”⁷⁷

(12) The system is supported by top managers

There appears to be limited visible evidence of the ‘sincere and visible championship’ of the tax dispute procedures by the senior management of Inland Revenue (including the NZ Commissioner), in the form of published speeches, presentations or other media releases.⁷⁸ However, internally Inland Revenue has a National Tax Disputes Process Committee which was established in 2007 to monitor and oversee the dispute process and make strategic decisions as necessary.⁷⁹ The committee is mainly comprised of second and third tier managers from a number of areas who are involved in different parts of the dispute process in Inland Revenue including: the Office of the Chief Tax Counsel (OCTC); Service Delivery; Investigations and Advice; Investigations; and Policy and Strategy. Nevertheless, while Inland Revenue have been encouraged by various commentators and professional bodies to use ADR methods such as mediation in the dispute procedures, Inland Revenue “remains committed to facilitated conferences and the benefits that they can provide.”⁸⁰ Furthermore, they are apparently currently not prepared to entertain the further use of ADR (over and above the existing conference facilitation process) in the dispute procedures.⁸¹

⁷⁴ Niels Campbell and Michael Hendriksen “The conference phase of the tax disputes process – what you need to know” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Wellington, 26-27 October 2012) at [5.7].

⁷⁵ Ward, above n 67, at 173.

⁷⁶ At 173.

⁷⁷ Keating, above n 5, at 172. See also, Clews and Duncan, above n 67, at 110.

⁷⁸ See Inland Revenue “Recent media releases” <<http://www.ird.govt.nz/aboutir/media-centre/media-releases/>> (last accessed 7 November 2016).

⁷⁹ Email from [redacted] (Director, [redacted], Inland Revenue, Wellington) to Melinda Jone regarding Inland Revenue’s National Tax Disputes Process Committee (6 May 2015).

⁸⁰ Karen Whitiskie “Five years on for facilitated conferences” (2015) 873 LawTalk 19 at 19.

⁸¹ Tubb, above n 73, at 154.

(13) The system is aligned with the mission, vision and values of the organisation

The dispute resolution system is integrated into the organisation through Inland Revenue's Charter in which Inland Revenue aspires to, inter alia, "inform you about options available if you disagree with us, and we will work with you to reach an outcome quickly and simply."⁸² With respect to this aspiration, the dispute resolution process provides the (only) means for taxpayers to file a formal dispute with Inland Revenue.

The dispute resolution system must also align with the NZ Commissioner's care and management responsibilities under s 6A of the TAA 1994. Section 6A indicates that the NZ Commissioner may be able to reach a compromise in some cases. However, settlement negotiations with taxpayers must take into account: the resources available to the NZ Commissioner; the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and the compliance costs incurred by taxpayers.⁸³ Although the courts have not specifically considered whether the NZ Commissioner can settle tax disputes before litigation or the formal dispute process has started, the NZ Commissioner considers that, in principle, there is no impediment to this being done.⁸⁴

The current NZ tax dispute resolution procedures were introduced in accordance with the recommendations of the Richardson Committee in the *Organisational Review of the Inland Revenue Department*.⁸⁵ The dispute resolution process was designed to encourage an "all cards on the table" approach and the resolution of issues without the need for litigation.⁸⁶ The purpose of the dispute procedures in Part IVA of the TAA 1994 is set out in s 89A as:

- improving the accuracy of disputable decisions made by the Commissioner under the Inland Revenue Acts;
- reducing the likelihood of disputes arising between the Commissioner and taxpayers by encouraging open and full communication between the two parties;
- promoting the early identification of the basis for any dispute concerning a disputable decision; and
- promoting the prompt and efficient resolution of any dispute concerning a disputable decision by requiring the issues and evidence to be considered by the Commissioner and a disputant before proceedings are commenced.

⁸² Inland Revenue, above n 21, at 1.

⁸³ TAA 1994, s 6A.

⁸⁴ Inland Revenue "IS 10/07: Care and management of the taxes covered by the Inland Revenue Acts – section 6A(2) and (3) of the Tax Administration Act 1994" (2010) 22(10) Tax Information Bulletin 17 ["IS 10/07"] at [156].

⁸⁵ Organisational Review Committee *Organisational Review of the Inland Revenue Department Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* (Wellington, 1994).

⁸⁶ At [10.11].

The Richardson Committee aimed for the procedures to be as quick, straightforward and fair as possible. They further noted that “the way tax disputes are resolved is critical to taxpayer perceptions of fairness and has wider impacts for the tax administration.”⁸⁷ While bearing in mind the purpose of the dispute procedures as well as the above remarks of the Richardson Committee, we can now turn to Inland Revenue’s overall organisational mission, vision, culture and values which are stated in Figure 4.2.

⁸⁷ At [10].

Figure 4.2: Inland Revenue’s Mission, Vision, Culture and Values⁸⁸

Our Mission

- We contribute to the economic and social wellbeing of all New Zealand by collecting and distributing money.

We achieve our mission when we deliver our outcomes:

- Revenue is available to fund government programmes through people meeting payment obligations of their own accord.
- People receive payments they are entitled to, enabling them to participate in society.
- New Zealanders benefit economically and socially through Inland Revenue working socially across our external environment.

Our Vision

- A world-class revenue organisation recognised for service and excellence.

As a world-class revenue organisation we will deliver our outcomes and live our culture and values.

Our Culture

What’s important to us in how we work:

- Customer-centric
- Intelligence-led
- Agile

Our Values

These values underpin the culture that will enable IR to be customer-centric, intelligence-led, and agile:

- Trust and integrity
- Valuing people
- Innovating to make a difference
- Working together

Arguably the purpose of the procedures outlined in s 89A TAA 1994, *prima facie*, does not appear to have a clear alignment with the overall mission, vision and values of Inland Revenue. However, an underlying connection between the dispute resolution procedures and the wider NZ tax system may arguably be found in the Richardson Committee’s recognition that the

⁸⁸ See Inland Revenue *IR for the future – Te Pae Tawhiti* (August 2016).

taxpayers' compliance is affected by their perceptions of tax dispute resolution.⁸⁹ As noted above, under s 6A of the TAA 1994, in the collection of taxes, the NZ Commissioner is required to have regard to, inter alia, the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts. This perhaps suggests that there may be some recognition, albeit through legislation, that a well-functioning dispute resolution system (as envisaged by the Richardson Committee), can potentially contribute towards enhancing voluntary taxpayer compliance.

Nevertheless, the development of the dispute resolution system is not an aspect which is specifically addressed in Inland Revenue's current *Statement of Intent*,⁹⁰ which sets out Inland Revenue's strategic intentions for the next four years. However, the tax dispute resolution system is mentioned in Inland Revenue's current Business Transformation programme which forms part of the NZ Government's current tax policy work programme.⁹¹ The Business Transformation programme is a multi-year, multi-stage change programme seeking to "modernise New Zealand's tax service to make it simpler and faster for New Zealanders to pay their taxes and give more certainty that they'll receive their entitlements."⁹² The programme involves changes that "will simplify and streamline [Inland Revenue's] business processes, policies and customer services as well as upgrade [Inland Revenue's] technology platform."⁹³ Inland Revenue acknowledge that "a quicker and more efficient tax administration requires a look at some of the tax system's key regimes and underpinning rules in the Tax Administration Act."⁹⁴ Thus, the avenues for taxpayers to seek advice from Inland Revenue and procedures for resolving disputes "will necessitate some change ... but the degree of change is still to be determined."⁹⁵

However, with respect to the integration of ADR within the organisation, as noted under DSD Principle 12, Inland Revenue appear to be reluctant in considering the use of any further forms of ADR (other than the current conference facilitation process) within the NZ tax dispute resolution procedures.⁹⁶

⁸⁹ Organisational Review Committee, above n 85, at [10].

⁹⁰ Inland Revenue *Statement of Intent 2016-20* (B-23 SOI, July 2016).

⁹¹ The NZ Government's current tax policy work programme is available on Inland Revenue's Policy and Strategy group's website at: <<http://taxpolicy.ird.govt.nz>> (last accessed 7 November 2016).

⁹² Inland Revenue "Business transformation: About Business transformation" (6 September 2016) <<http://www.ird.govt.nz/transformation/about-business-transformation/about-business-transformation-index.html>> (last accessed 7 November 2016).

⁹³ Inland Revenue, above n 92.

⁹⁴ Inland Revenue *Making Tax Simpler – Towards a New Tax Administration Act: A Government Discussion Document* (November 2015) at 66.

⁹⁵ At 66.

⁹⁶ See Tubb, above n 73, at 154.

(14) **There is evaluation of the system**

Taxpayers can provide general feedback (for the potential evaluation of the system) on Inland Revenue's "products and services" (which theoretically encompasses feedback on the dispute resolution procedures) through the completion of an online form on Inland Revenue's website.⁹⁷ Also, as noted under DSD Principle 4, there is a mechanism for taxpayers to provide feedback (for evaluation) specifically on their experiences with Inland Revenue's facilitated conferences through a survey form provided to participants at the end of facilitated conference meetings.

External evaluation and scrutiny of the system is provided by commentators, practitioners and professional bodies such as CA-ANZ (or the former NZICA) and NZLS through their various submissions made to Inland Revenue and the NZ Treasury on the operation of the tax dispute resolution process.⁹⁸ External evaluation of the dispute resolution system can also potentially occur through performance audits conducted by the Controller and Auditor-General.⁹⁹ In addition, evaluation of the dispute resolution system is provided by the annual *IR Satisfaction Survey* administered by CA-ANZ and Tax Management New Zealand (TMNZ) to CA-ANZ members in NZ. Since 2012 a section on members' experiences with the tax dispute resolution process has been included in this survey. However, the findings from these surveys are arguably somewhat limited as the percentage of members surveyed which have been involved in the dispute resolution process in the 12-month period prior to the surveys has typically been low.¹⁰⁰

Evaluation of the dispute resolution procedures is also included as part of various comprehensive reviews conducted on the NZ tax administration system. Examples of such reviews include the *Organisational Review of the Inland Revenue Department* in 1994¹⁰¹ and

⁹⁷ Inland Revenue, "Get it done online: Comments and feedback" <<https://www.ird.govt.nz/online-services/service-name/services-c/online-provide-comment.html?id=righttabs>> (last accessed 7 November 2016).

⁹⁸ See, for example, Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994*, above n 12; Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *Disputes: A Review, July 2010*, above n 12; Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants "Submission to the Finance and Expenditure Committee on the Taxation (Tax Administration and Remedial Matters) Bill", above n 12.

⁹⁹ To date, the Controller and Auditor-General has not evaluated the NZ tax dispute resolution system in its entirety.

¹⁰⁰ For example, in the 12-month period prior to the 2015 survey, only 13 per cent of the members surveyed had been involved in the dispute resolution process. See Colmar Brunton, above n 67.

¹⁰¹ Organisational Review Committee, above n 85.

the *Report to the Treasurer and Minister of Revenue - By a Committee of Experts on Tax Compliance* in 1998.¹⁰²

4.3 Australia

4.3.1 The tax dispute resolution procedures

As indicated in Figure 4.3, tax disputes in Australia can arise when a taxpayer disagrees with an amended assessment issued by the ATO following an audit or post-assessment review of a taxpayer's affairs. The steps in the tax dispute resolution procedures which then follow include:

- An objection lodged by the taxpayer;
- The ATO's internal objection decision either allowing or disallowing the taxpayer's objection; and
- If the objection is disallowed the taxpayer may file an application for appeal or review in the Administrative Appeals Tribunal (AAT)¹⁰³ or the Federal Court of Australia.

In addition, as shown in Figure 4.3, ADR may be utilised by the parties as a means of resolving disputes generally at any stage of the dispute process.¹⁰⁴ Parties can also be referred to ADR in the AAT or the Federal Court of Australia.¹⁰⁵ Furthermore, as indicated in Figure 4.3, the ATO offers in-house facilitation (a specifically-developed ATO ADR program for smaller and less complex disputes)¹⁰⁶ at the audit and objection stages of the dispute procedures and an independent review process for large business taxpayers (an ATO early dispute resolution process for taxpayers with an annual turnover of more than \$A250 million)¹⁰⁷ at the audit stage. A more detailed description of the Australian dispute resolution procedures and its related features is contained in Appendix 1.2 of this thesis.

¹⁰² Committee of Tax Experts *A Report to the Treasurer and Minister of Revenue – By a Committee of Experts on Tax Compliance* (Wellington, 1998).

¹⁰³ All applications in the AAT about tax decisions are managed in the Taxation and Commercial Division.

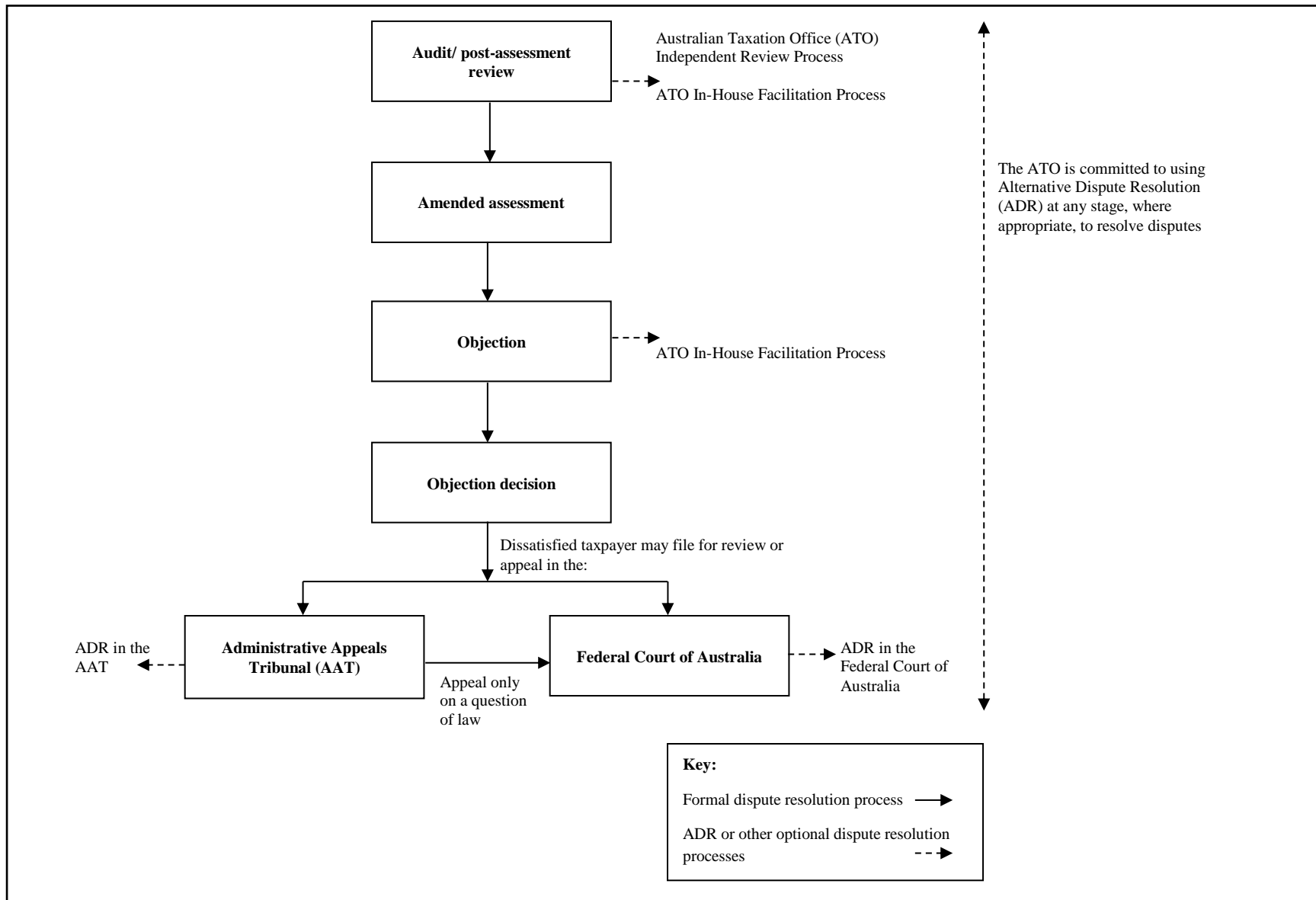
¹⁰⁴ For further details, see section 1.2.2.1 of Appendix 1.2 of this thesis.

¹⁰⁵ For further details, see section 1.2.3 of Appendix 1.2 of this thesis.

¹⁰⁶ For further details, see section 1.2.2.2 of Appendix 1.2 of this thesis.

¹⁰⁷ For further details, see section 1.2.4.2 of Appendix 1.2 of this thesis.

Figure 4.3: The Australian Tax Dispute Resolution Procedures



4.3.2 Evaluation using dispute systems design principles

(1) Stakeholders are included in the design process

The ATO involves stakeholders in the design process in various ways such as in the pilot testing of ATO ADR processes (for example, the ATO's in-house ADR facilitation pilot) and through seeking stakeholders' views on their experiences with ADR in tax disputes with the ATO (for example, the Australian Centre for Justice Innovation's (ACJI) *Evaluating Alternative Dispute Resolution in Taxation Disputes* user experience survey).¹ Both of the above design-related initiatives involving stakeholders are examples of one-off fixed-life ATO initiatives which originated from recommendations made by the Inspector-General of Taxation (IGT) in his *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution* in 2012.²

The ATO also involves stakeholders in the design process through consultation with groups such as the Dispute Resolution Working Group which was formed in December 2013 to consult on specific strategies around dispute prevention and early resolution of disputes. The membership of this consultative group includes representatives from the main tax professional associations, the Law Council of Australia, the Federal Court of Australia, the AAT, academics, industry, the Attorney-General's Department and senior ATO officers. The National Tax Liaison Group (NTLG), the ATO's peak consultative forum for tax practitioners and other intermediaries, is also involved in the design process. The NTLG comprises of representatives of the major tax, law, superannuation and accounting professional associations and senior members of the ATO. Among other things, the NTLG was consulted with during the implementation of the ATO's independent review process and in the revision and updating of Practice Statement Law Administration 2013/3 (PS LA 2013/3).³ There is also ATO consultation with the Legal Practitioner's Round Table which has representatives from the Law Council of Australia, all State and Territory law societies and bar associations, law firms and the Australian Corporate Lawyers Association.

In addition, a range of stakeholders are included in the design process through inquiries on the tax dispute resolution process conducted by parliamentary committees and through reviews of and submissions sought on the tax dispute resolution process by independent statutory bodies. For example, various reviews conducted by the IGT have drawn submissions from a wide range

¹ See Tania Sourdin and Alan Shanks *Evaluating Alternative Dispute Resolution in Taxation Disputes: Final Report* (Australian Centre for Justice Innovation, Monash University, 23 February 2015).

² Inspector-General of Taxation, *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution: A report to the Assistant Treasurer* (Sydney, May 2012) at 44, [3.99] and 95, [5.93].

³ Australian Taxation Office "Practice Statement Law Administration 2013/3: Alternative Dispute Resolution (ADR) in ATO Disputes" (2013) <<http://law.ato.gov.au/atolaw/view.htm?locid=PSR/PS20133/NAT/ATO>> (last accessed 7 November 2016) ["PS LA 2013/3"].

of stakeholders including taxpayers, tax practitioners and their representative bodies, dispute resolution experts and members of the judiciary.⁴ The IGT has also consulted with ATO representatives and met with interested taxpayers, tax practitioners and their respective representative bodies as well as legal experts and dispute resolution practitioners as part of these reviews.

(2) The system has multiple options for addressing conflict including interests, rights and power-based processes

The Australian tax dispute resolution system has multiple options for addressing conflict. These are generally as follows. The ATO encourage disputes to be resolved through direct negotiation with the ATO officer involved in the dispute in the first instance. If the dispute cannot be resolved through negotiation, the taxpayer may lodge a formal objection with the ATO where the decision is internally reviewed by a different ATO officer. If the taxpayer is dissatisfied with the internal review outcome they may then utilise rights-based processes through proceeding to litigation in either the AAT or the Federal Court of Australia. As provided by PS LA 2013/3, ADR processes are generally available at any stage of the dispute process including: “after the ATO issues a position paper during an audit; during a review at the objection stage before a final decision is made by an ATO officer; or during the litigation stage.”⁵ These ADR processes include both interest-based procedures (for example, facilitation and mediation) and rights-based procedures (for example, early neutral evaluation (ENE)). The system also offers certain taxpayers the option to resolve disputes using ATO dispute resolution programs available at specific points of the dispute process. These include: ATO in-house facilitation, an interests-based ADR process available at the audit and objection stages for indirect tax, small business and individual market disputes; and a rights-based ATO independent review process available at the audit stage for large business taxpayers. Interests and rights-based ADR processes (for example, conferencing, conciliation, mediation and ENE) are further available for disputes reaching the AAT and the Federal Court of Australia.⁶

(3) The system provides for loops backward and forward

Loop-backs in the dispute process are provided for in the respect that ADR options are theoretically available at all stages of the Australian dispute resolution process. In this regard, the ADR processes available at the litigation stage before a hearing in the AAT or the Federal Court of Australia provide examples of loop-backs from rights-based to interests-based processes. A loop-back may also occur following the lodgment of an objection by a taxpayer

⁴ See Inspector-General of Taxation, above n 2; Inspector-General of Taxation *Review into the Underlying Causes and the Management of Objections to Tax Office Decisions* (Sydney, April 2009); Inspector-General of Taxation *The Management of Tax Disputes: A Report to the Assistant Treasurer* (Sydney, January 2015).

⁵ Australian Taxation Office “PS LA 2013/3”, above n 3, at [17].

⁶ The review process for cases in the AAT ordinarily includes conferencing and further forms of ADR such as mediation, conciliation, case appraisal and neutral evaluation.

where the parties might agree to participate in ENE before the ATO's objection decision is issued. In this process the ADR practitioner gives advice to the parties about the likely outcome if the matter were to proceed to the AAT or the Federal Court of Australia and as a result, the parties may negotiate an agreement based on the advice received.

The early assessment and resolution (EAR) process applied to all cases in the AAT also constitutes a loop-back mechanism in the respect that the focus of the process is to identify cases in the AAT which can be preferably be resolved through direct negotiation (without the need for an AAT hearing).⁷ Given that taxpayers must go through the ATO's internal review process before appealing an ATO decision externally to the AAT or the Federal Court of Australia, taxpayers are unable to loop-forward in the formal Australian tax dispute resolution process.⁸

(4) There is notification before and feedback after the resolution process

Notification is built into the dispute resolution process through the ATO's Taxpayer's Charter which requires the ATO to clearly stipulate its decision to the taxpayer, provide an explanation of its reasons for the decision and inform the taxpayer of their rights and obligations in relation to the decision.⁹ Other ATO initiatives such as its compliance strategy, which is outlined in "Building Confidence", also provide a form of notification.¹⁰ This web-based resource delivers messages to the community about the emerging risks and issues which the ATO see in the tax and superannuation system and what the ATO intend to do about them. Hence, this acts to highlight recent developments in ATO compliance activities and risk areas where potential disputes may arise. ATO Decision Impact Statements, which are succinct statements of the Australian Commissioner of Taxation's (the Australian Commissioner's) response to significant cases decided by the courts or tribunal, provide a further example of notification in the dispute resolution process. They serve to advise the community of the ATO's view on the implications of a particular court or tribunal decision.¹¹

⁷ Australian Taxation Office "Early assessment and resolution" (26 May 2014) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Litigation/Early-assessment-and-resolution/>> (last accessed 7 November 2016). For further details see also, section 1.2.4.3 of Appendix 1.2 of this thesis.

⁸ As defined in chapter 2, section 2.5.3 of this thesis, a loop-forward mechanism allows parties to move directly to a rights or power-based procedure without having to go through all of the earlier processes. However, as indicated above, this is not a feature of the Australian system (but loop-back procedures are).

⁹ Australian Taxation Office *Taxpayer's Charter – What you need to know* (Canberra, June 2010) at 14.

¹⁰ Australian Taxation Office "Building confidence" (29 October 2015) <<https://www.ato.gov.au/General/Building-confidence/>> (last accessed 7 November 2016). Building Confidence is the new name for what was known as Compliance in Focus, and before that, the Compliance Program.

¹¹ ATO Decision Impact Statements, listed by calendar year, are available from the ATO's Legal Database on the ATO's website: Australian Taxation Office "Legal database" <<https://www.ato.gov.au/law/#Law>> (last accessed 7 November 2016).

Systemic feedback occurs through general statistics provided on the ATO's website with respect to "Resolving disputes", "Compliance activity and objections", and "Litigation statistics".¹² Feedback and analysis at the systemic level is also evident in the ATO annual report which typically includes a separate section that reports on "Resolving disputes."¹³

Feedback at the micro-level on specific ATO dispute resolution programs is provided in the respect that following the completion of ATO dispute resolution programs such as in-house facilitation and ATO independent review, taxpayers are invited to complete a feedback form on the process and at the end of an ATO independent review, a thorough debrief involving all participants is conducted. The feedback received is used to improve processes. Internal feedback on ADR also occurs through maintenance of the ATO's internal ADR register in which ATO staff are required to record details of all matters in which an externally facilitated ADR process is undertaken.

(5) The system has a person or persons who function as internal independent confidential neutral(s)

There is no internal independent confidential neutral in the ATO whom taxpayers can go to for coaching, referring and problem-solving. However, taxpayers can seek advice externally on dispute resolution from professional advisors at their own expense. This would be similar to taxpayers having to engage professional advisors on tax technical matters in relation to tax disputes. The ATO has established an ADR Network which consists of senior ATO officers who have knowledge and experience of working with ADR matters. The ADR Network are available to provide guidance and mentoring support to ATO case officers on the use of ADR techniques and strategies and would thus function as internal independent confidential neutrals for ATO case officers. The names of the network's members are published on the ATO's intranet.¹⁴

(6) Procedures are ordered from low to high cost

The formal dispute procedures are ordered in a low to high cost sequence in the respect that there is the opportunity for direct negotiation in the first instance, followed by the ATO's internal review process and then external review or appeal to the AAT or the Federal Court of

¹² See Australian Taxation Office "Resolving disputes" (31 August 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Resolving-disputes/>> (last accessed 7 November 2016); Australian Taxation Office "Compliance activity and objections" (19 May 2014) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Compliance-activity-and-objections/>> (last accessed 7 November 2016); and Australian Taxation Office "Litigation statistics" (27 May 2014) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Litigation-statistics/>> (last accessed 7 November 2016).

¹³ See, for example, Australian Taxation Office *Commissioner of Taxation Annual Report 2014-15* (Canberra, October 2015) at 59-62; Australian Taxation Office *Commissioner of Taxation Annual Report 2015-16* (Canberra, October 2016) at 46-48.

¹⁴ Inspector-General of Taxation, above n 2, at 15, [2.28].

Australia respectively. This sequence generally implies an increase in costs at each level, particularly when the dispute is escalated to a tribunal or court. However, the option to employ ADR potentially at any stage of the dispute process adds further costs at the stage at which ADR is utilised in the dispute process. Although, if the dispute is settled at that stage, then parties do not subsequently have to move further up the sequence to higher cost processes.

While the DSD literature suggests that there should be an increase in costs at each level in order to increase the pressure for a negotiated outcome at an early stage,¹⁵ it is worth noting that in the context of the Australian tax dispute resolution procedures, the low to high cost sequence impacts differently on different types of taxpayers. For small taxpayers there may be a noticeable increase in costs at each level, particularly if they pursue informal processes and/or recourse to the AAT or the Federal Court of Australia.¹⁶ However, it has been observed that rather than increasing the pressure for a negotiated outcome at an early stage, the increasing incremental costs may in fact form a deterrent for small taxpayers in pursuing tax disputes at all and therefore, a barrier to social justice.¹⁷ Whereas for large taxpayers, whatever the minimal difference in costs to them between the levels is unlikely to increase the pressure for a negotiated outcome and deciding which recourse to pursue is likely to be a strategic-based and commercial decision rather than costs-based.¹⁸

Furthermore, similar to the NZ tax dispute resolution process (discussed in section 4.2.2 above), notwithstanding the apparent low to high cost sequence of the formal dispute procedures, the Australian tax dispute resolution process can require substantial upfront costs from the taxpayer (for example, the time spent by the taxpayer in preparing for, and participating in negotiations as well as the cost of professional advisors). Professional advice and assistance costs, if incurred, generally represent the bulk of the monetary costs to taxpayers.¹⁹ This may serve as a further barrier, particularly for small taxpayers, as it is usually necessary for taxpayers in tax disputes to have their positions worked out from the beginning.

(7) The system has multiple access points

The formal dispute process commences when a taxpayer lodges an objection with the ATO. Thus, structurally the formal dispute process has only one entry point to the system. An objection must be lodged in writing and procedurally, taxpayers can either use the form

¹⁵ William L Ury, Jeanne M Brett and Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, Cambridge, MA, first published 1988, 1993 ed) at 62-63.

¹⁶ Sheena Mookhey “Tax disputes system design” (2013) 11 EJTR 79 at 91.

¹⁷ At 91.

¹⁸ At 91.

¹⁹ Binh Tran-Nam and Michael Walpole “Independent tax dispute resolution and social justice in Australia” (2012) 35(2) UNSWLJ 470 at 488.

provided by the ATO or write a letter. There are further multiple procedural ways in which taxpayers can enter the system in the respect that objections can be lodged by fax, post, hand delivered to an ATO shopfront or lodged online.

The Australian dispute resolution procedures offer a choice of access persons to whom certain system users can approach in the first instance in the respect that the ATO offer a range of support services to help people from non-English speaking backgrounds, Indigenous Australians and people with disabilities. For example, people from non-English speaking backgrounds can phone the Translating and Interpreting Service for help with their calls or if they want to speak to an ATO officer in their preferred language, Aboriginal and Torres Strait Islander people can ring the ATO's Indigenous Helpline which specialises in helping indigenous clients with a range of matters, and people who are deaf or have a hearing or speech impairment can contact the ATO through the National Relay Service.²⁰ While these services provide a choice of persons for certain taxpayers to contact the ATO generally, they arguably also may serve to provide a choice of access persons to approach for certain taxpayers to acquire information about the disputes system in the first instance.

Multiple forms of access to the system for certain taxpayers are further provided in the respect that certain information to help people from non-English speaking backgrounds is available on the ATO's website in a range of different languages.²¹ Some of this information may be relevant to the disputes system and how to access it.

(8) The system includes training and education for stakeholders

The ATO's webpage "Dispute or object to an ATO decision" provides information on the options available to taxpayers where they disagree with a decision that the ATO have made about their tax affairs.²² Links are provided to further pages that provide information on, inter alia, how to object to an ATO decision, seek an external review of an ATO decision and other options for resolving disputes, including ADR, in-house facilitation, litigation and settlement.

The ATO further provides a range of information concerning ADR. PS LA 2013/3 provides guidance and instructions for ATO personnel on what policies and guidelines must be followed when attempting to resolve or limit disputes by means of ADR.²³ It also explains the ATO's

²⁰ See Australian Taxation Office "Phone us" (1 November 2016) <<https://www.ato.gov.au/about-ato/about-us/contact-us/phone-us/>> (last accessed 7 November 2016).

²¹ See Australian Taxation Office "Other languages" (3 August 2016) <<https://www.ato.gov.au/General/Other-languages/>> (last accessed 7 November 2016).

²² See Australian Taxation Office "Dispute or object to an ATO decision" (27 January 2016) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/>> (last accessed 7 November 2016).

²³ Australian Taxation Office "PS LA 2013/3", above n 3. See also, Australian Taxation Office "Practice Statement Law Administration 2009/9: Conduct of ATO litigation and engagement of ATO Dispute Resolution" (2009) <<http://law.ato.gov.au/atolaw/view.htm?DocID=PSR/PS20099/NAT/ATO/00001>> (last accessed 7

obligations and approach with respect to ADR. PS LA 2013/3 is made publically available for other interested stakeholders, including taxpayers and their advisors, on the ATO's website. The *ATO plain English guide to alternative dispute resolution* on the ATO's website is a guide which explains in simple language, dispute resolution, ADR and the types of ADR processes that are used in tax and superannuation disputes, and also provides links to other ADR resources internal and external to the ATO.²⁴ In addition, other documents such as the ATO's Disputes Policy,²⁵ Dispute Management Plan²⁶ and Code of Settlement²⁷ provide information on the ATO's approach towards dispute resolution and the settlement of tax disputes.

In relation to the training in ADR of various ATO staff involved in dispute resolution, the ATO state that ATO case officers may, but do not always, have training in negotiation from an in-house training provider.²⁸ Nevertheless, as part of the ATO's current "Reinventing the ATO" project, which aims to transform the ATO into a "contemporary and service-orientated organisation",²⁹ a number of ATO frontline staff are now "undergoing training on how to better communicate with taxpayers during disputes."³⁰ ATO in-house facilitators have the equivalent of five days of mediation training, externally provided by either Resolution Institute or the Australian Disputes Centre (ADC).³¹ The ATO state that their facilitators are not required to be accredited mediators as this would entail a registration cost and an ongoing continuing professional development (CPD) requirement.³²

November 2016) ["PS LA 2009/9"] which includes ATO policies and guidelines on ADR when matters are in litigation.

²⁴ See Australian Taxation Office "ATO plain English guide to alternative dispute resolution" (1 June 2015) <<http://www.ato.gov.au/About-ATO/About-us/In-detail/Key-documents/ATO-plain-English-guide-to-alternative-dispute-resolution/>> (last accessed 7 November 2016).

²⁵ See Australian Taxation Office "Disputes policy" (7 September 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Resolving-disputes/Disputes-policy/>> (last accessed 7 November 2016). For further details see also, section 1.4.2.1 of Appendix 1.2 of this thesis.

²⁶ Australian Taxation Office *Dispute management plan 2013-14* (Canberra, January 2014). For further details see also, section 1.4.2.1 of Appendix 1.2 of this thesis.

²⁷ Australian Taxation Office "Code of settlement" (18 August 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Settlement/Code-of-settlement/>> (last accessed 7 November 2016) and Australian Taxation Office "Practice Statement Law Administration 2015/1: Code of settlement" (2015) <<http://law.ato.gov.au/atolaw/view.htm?docid=%22PSR%2015%201%20FNAT%20FATO%20F00001%22>> (last accessed 7 November 2016) ["PS LA 2015/1"].

²⁸ Email from [redacted] (Senior Principal Lawyer, [redacted], Australian Taxation Office) to Melinda Jone regarding ATO ADR staff training (9 June 2014).

²⁹ See Australian Taxation Office "Reinventing the ATO" (16 September 2016) <<https://www.ato.gov.au/About-ATO/About-us/Reinventing-the-ATO/>> (last accessed 7 November 2016).

³⁰ Nassim Khadem "ATO seeks to make tax disputes resolution more cordial" *Sydney Morning Herald* (online ed, Sydney, 20 July 2015).

³¹ Email from [redacted] (Director, [redacted], Australian Taxation Office) to Melinda Jone regarding ATO facilitator training and accreditation (24 March 2016).

³² Email from [redacted] (Senior Principal Lawyer, [redacted], Australian Taxation Office), above n 28.

The IGT's *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution* in 2012 recommended that the ATO should develop a targeted suite of training products (focusing on early identification of potential issues in dispute, and negotiation and conflict management skills) with the relevant ATO staff being required to complete the above targeted training as part of their performance development agreements.³³ Consequently, the ATO Learning and Development team have developed a Dispute Management curriculum which "supports managers in ensuring that staff members are provided the necessary training identified through the personal development agreement process."³⁴ The curriculum was implemented in August 2014 and is supported by a number of supplementary resources including articles, videos, books, journals and web-based material.³⁵

(9) Assistance is offered for choosing the best process

The ATO provide various forms of guidance and assistance with respect to choosing ADR processes. PS LA 2013/3 provides guidelines on the use of ADR and describes circumstances when ADR may or may not be appropriate.³⁶ The disputes system includes process advisors in the respect that ATO's Review and Dispute Resolution (RDR) business line is responsible for administering ADR processes and policies, and providing advice on ADR and its availability.³⁷ Furthermore, requests for ADR by either the ATO officer involved in the dispute or the taxpayer, must be reviewed as to their appropriateness for ADR by the relevant ATO manager(s) and ATO technical staff (including RDR officers).³⁸

The early engagement process for large business taxpayers assists in the selection of processes prior to the commencement of the formal dispute process (that is, prior to the lodgement of any objection).³⁹ The early engagement process provides an opportunity for taxpayers to meet with ATO staff in order to discuss the best way to deal with a correction or change to a large business tax return. The process assists large business taxpayers in deciding whether to request an amendment (use the amendment process) or lodge an objection (use the dispute resolution process).

³³ Inspector-General of Taxation, above n 2, at 47.

³⁴ Australian Taxation Office "Review into the ATO's use of ADR: Recommendation 3.7" (13 November 2014) <<https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Inspector-General-of-Taxation/Review-into-the-ATO-s-use-of-ADR/?anchor=Recommendation37#Recommendation37>> (last accessed 7 November 2016).

³⁵ Australian Taxation Office, above n 34.

³⁶ Australian Taxation Office "PS LA 2013/3", above n 3, at [7]-[9].

³⁷ Email from [redacted] (Senior Principal Lawyer, [redacted], Australian Taxation Office) to Melinda Jone regarding ATO ADR (21 July 2014).

³⁸ Australian Taxation Office "PS LA 2013/3", above n 3, at [20]-[21].

³⁹ See Australian Taxation Office "Early engagement – what to expect" (5 October 2016). <<https://www.ato.gov.au/Business/Large-business/Objections-and-amendments/Early-engagement---what-to-expect/>> (last accessed 7 November 2016). For further details see also, section 1.2.4.4 of Appendix 1.2 of this thesis.

(10) Disputants have the right to choose a preferred process

As noted above, taxpayers must go through the ATO's internal review process before appealing externally to the AAT or the Federal Court of Australia. Therefore, taxpayers are unable to choose a preferred process at the very outset of a dispute. However, disputants are able to choose a preferred process in the respect that ADR is generally available at any stage of the dispute process. This feature means that the Australian dispute process is multi-option in the regard that disputants are able to select between the formal dispute process and ADR processes at any stage where appropriate. Furthermore, if an ADR process is unable to resolve a dispute in whole or in part, taxpayers' review and appeal rights in the formal dispute process are unaffected by their participation in ADR, subject to the terms of any settlement reached and compliance with the legislative timeframes. In the Federal Court of Australia parties also have the option of requesting that a matter be referred to mediation, either court-annexed (through a registrar) or a private mediation, prior to commencing formal court proceedings.⁴⁰

In addition, there was formerly the option for certain taxpayers to choose a preferred process in the AAT in the respect that where the amount of tax in dispute was under \$5,000, qualifying taxpayers could elect to have disputes dealt with (less formally) in the Small Taxation Claims Tribunal (STCT) instead of the Taxation Appeals Division (TAD) of the AAT.⁴¹ However, pursuant to the Tribunals Amalgamation Act 2015 (Cth), from 1 July 2015, the concept of the STCT no longer exists and all applications to the AAT about tax decisions are now managed in the new Taxation and Commercial Division.⁴²

(11) The system is fair and perceived as fair

Perceptions of fairness of the operation of the Australian tax dispute resolution system has been an ongoing topic of concern highlighted in various reviews and inquiries on dispute resolution in the ATO. The IGT's *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution*⁴³ in 2012 highlighted mixed views on the operation of the tax dispute resolution system and the ATO's use of ADR. The IGT's report found that in some instances, the ATO's dispute resolution processes were seen as working well, with senior staff appropriately engaged, issues identified and ADR processes employed to address and resolve specific cases.⁴⁴ However, in other cases, some taxpayers' experiences appeared to be varied with officers appearing uncertain of their ability or authority to engage in discussions with taxpayers to address concerns and resolve disputes early in the process.⁴⁵

⁴⁰ Federal Court Rules 2011 (Cth), r 28.02.

⁴¹ For further details on the former STCT, see section 1.2.1 of Appendix 1.2 of this thesis.

⁴² Tribunals Amalgamation Act 2015 (Cth), s 27.

⁴³ Inspector-General of Taxation, above n 2.

⁴⁴ At v.

⁴⁵ At v.

More recently, on 2 June 2014, the then Acting Assistant Treasurer, Senator the Hon Mathias Cormann, referred an *Inquiry into Tax Disputes* (the Inquiry) to the House of Representatives Standing Committee on Tax and Revenue (the Committee).⁴⁶ The Inquiry was initiated because stakeholders and taxpayers had expressed concern that the ATO did not always use its powers in a judicious manner and did not always treat taxpayers fairly and with respect.⁴⁷ The Committee's Inquiry focused on small taxpayers and individuals with annual turnovers of up to \$A250 million. The Committee requested the IGT to conduct a similar inquiry concerning large taxpayers and high wealth individuals.⁴⁸

The Committee found that adverse outcomes in some ATO disputes arose from a combination of factors. These included that the ATO has strong powers, it does not always engage with taxpayers (or demonstrate that it is listening to taxpayers' arguments), and there has not been clear separation between the investigative and review functions within the ATO.⁴⁹ Accordingly, the risk was that a taxpayer may not have a fair hearing, or at least perceive that this had been the case, until their matter proceeded to the AAT.⁵⁰ Such a course involved substantial time and expense. Moreover, the Committee received evidence that "once the ATO decides a taxpayer has an outstanding liability, the balance of power in SME disputes is very much in favour of the ATO."⁵¹ This balance of power exists at the legal, commercial, and emotional levels and raised the question of whether these taxpayers withdraw from disputes due to attrition.⁵²

Among other things, the Committee supported the recommendation made in a report by the IGT⁵³ for the creation of a separate Appeals Group within the ATO, led by a new independent Second Commissioner responsible for managing tax disputes for all taxpayers.⁵⁴ Hence, partly in response to the findings from the Inquiry, effective from 1 July 2015, all objections to the ATO now come under the purview of the ATO's RDR business line (headed by the Deputy Commissioner) which is separate from the Client Engagement (formerly known as Compliance) and Tax Counsel areas of the ATO.

⁴⁶ For the Committee's report, see House of Representatives Standing Committee on Tax and Revenue *Tax Disputes* (Canberra, March 2015).

⁴⁷ At vii.

⁴⁸ For the IGT's report, see Inspector-General of Taxation *The Management of Tax Disputes: A Report to the Assistant Treasurer*, above n 4.

⁴⁹ House of Representatives Standing Committee on Tax and Revenue, above n 46, at vii.

⁵⁰ At vii.

⁵¹ At 7, [1.25].

⁵² At 7-8, [1.25].

⁵³ Inspector-General of Taxation *The Management of Tax Disputes: A Report to the Assistant Treasurer*, above n 4, at viii.

⁵⁴ House of Representatives Standing Committee on Tax and Revenue, above n 46, at 18, [6.128].

With respect to stakeholder perceptions of fairness of particular ATO dispute resolution processes, there appear to be mixed findings. The ATO's ADR facilitation pilot found that taxpayers were "generally comfortable" with having an ATO officer as a facilitator and only one case in the pilot expressed concerns over the lack of independence of the facilitator.⁵⁵ However, current anecdotal evidence suggests that stakeholders (both within the ATO and in the taxpayer community) are still reluctant to try the ATO's internal ADR program.⁵⁶ In relation to fairness perceptions of the ATO's independent review process, the ATO state that "feedback has been consistently positive about the level of independence, the service provided, and the process and the professionalism of the reviewers."⁵⁷ Yet, on the other hand commentators have observed that "while the Tax Office thinks it is working beautifully, tax advisers don't think it is independent enough."⁵⁸

The ACJI's *Evaluating Alternative Dispute Resolution in Taxation Disputes* user experience survey, which primarily examined ADR processes such as mediation and conciliation in the AAT, reported that in terms of participants' perceptions of the impartiality of the ADR process, over 90 per cent of those surveyed considered that both sides in the ADR process had been treated "equally."⁵⁹ However, a small number of negative comments were made by survey respondents about participation and these were mainly linked to "behaviours within the ADR process."⁶⁰ That is, on a few occasions it was noted that "the ATO was critical of the taxpayer (or their representatives) or the taxpayer or their representative was concerned about ATO ... behaviour."⁶¹ This observation arguably appears to align with the above findings of the Committee in the Inquiry.

(12) The system is supported by top managers

Support and championship of a dispute resolution culture and an emphasis on the use of ADR have featured as recurring topics in various speeches made by current the Australian Commissioner, Chris Jordan.⁶² Since his appointment in 2013, the Australian Commissioner

⁵⁵ Australian Taxation Office, *GST Administration Annual Performance Report 2012-13* (Canberra, November 2013) at 52.

⁵⁶ Email from [redacted] (A/g Assistant Commissioner, [redacted], Australian Taxation Office) to Melinda Jone regarding ATO dispute resolution (7 May 2015). See also, Nassim Khadem "ATO 'cowboys' culture ruined lives, inquiry told" *Sydney Morning Herald* (online ed, Sydney, 29 November 2014).

⁵⁷ Damien Browne and Ashley King "The latest on the ATO's Management of Tax Audits and Disputes" (paper presented to The Tax Institute's 30th National Convention, Gold Coast, 18-20 March 2015) at 21-22, [3.2.1].

⁵⁸ Nassim Khadem, above n 56.

⁵⁹ Sourdin and Shanks, above n 1, at 50-51, [3.26].

⁶⁰ At 46, [3.16].

⁶¹ At 46, [3.16].

⁶² The speeches of the current Australian Commissioner are available at the Media Centre on ATO's website at: Australian Taxation Office "Media centre" <<https://www.ato.gov.au/Media-centre/?sorttype=SortByType>> (last accessed 7 November 2016).

has embarked on a project of “Reinventing the ATO” (as noted under DSD Principle 8).⁶³ The way in which the ATO manages tax disputes has been one of his key focus areas.⁶⁴ Hence, over recent years under his direction, the ATO has focused on dispute prevention, early resolution, and alternative methods for resolving matters including: early face-to-face or telephone engagement; the increased use of ADR, including the use of in-house facilitators; independent review for large business taxpayers; and sensible settlement guidelines.⁶⁵

Changes to the organisational structure of the ATO have also been made to give effect to the ATO’s aim of the earlier resolution of disputes, including through using ADR. A restructure of the ATO in 2013 reshaped the role of Second Commissioner Law to be responsible for the Law Design and Practice Group, which comprised of Integrated Tax Design, Tax Counsel Network and RDR.⁶⁶ RDR, led by the Deputy Commissioner, has a particular focus on delivering new ways of undertaking specific activities which have included ATO wide responsibility for: resolving disputes earlier; championing the use of ADR to resolve disputes; establishing an independent review process for large business; and managing and improving the objections function.⁶⁷ It follows that the Second Commissioner Law Design and Practice and the Deputy Commissioner, RDR, have also made a number of speeches and conference presentations on dispute resolution and ADR in the ATO.⁶⁸

(13) The system is aligned with the mission, vision and values of the organisation

The disputes system is integrated into the organisation through various mechanisms including the Taxpayers’ Charter which outlines what taxpayers can expect when they deal with the ATO. The Taxpayers’ Charter provides that taxpayers have a right request a review of an ATO decision and also a right to make a complaint where they are not satisfied with the decisions services or actions of the ATO.⁶⁹

⁶³ See Australian Taxation Office, above n 29.

⁶⁴ Debbie Hastings “Reinventing the way we manage tax disputes” (speech to the Tax Institute of Australia Financial Services Conference 2015, Surfers Paradise, 20 February 2015).

⁶⁵ Chris Jordan “Reinventing the ATO” (speech to the Tax Institute’s 30th National Convention, Gold Coast, 18-20 March 2015).

⁶⁶ The Law Design and Practice Group currently comprises of Policy, Analysis and Legislation, Tax Counsel Network and RDR.

⁶⁷ Australian Taxation Office “Submission on the Productivity Commission Inquiry: Access to Justice Arrangements” (12 February 2014) at 4, [11].

⁶⁸ The speeches of the current Second Commissioner Law Design and Practice, Andrew Mills and the Deputy Commissioner, RDR, Debbie Hastings, are available at the Media Centre on ATO’s website at: Australian Taxation Office, above n 62.

⁶⁹ Australian Taxation Office, above n 9, at 11-12.

The ATO's Dispute Management Plan⁷⁰ outlines the ATO's high-level framework for managing and resolving disputes. The ATO's Disputes Policy⁷¹ is the supporting document that complements and provides the underpinning framework for the Dispute Management Plan. It also sets out the ATO's principles for managing disputes. Together these documents are intended to provide a coordinated and consistent approach to dispute management within the ATO. The ATO's objectives in managing its disputes with taxpayers, as outlined in its Disputes Policy and Dispute Management Plan, are:⁷²

- Faster and earlier resolution of disputes
- Reduce the number of disputes
- Lower your costs and our costs
- Enhance our relationship with the community
- Make your interactions with us easier.

The ATO's overall organisational mission, vision, values and goals are outlined in Figure 4.4:

⁷⁰ Australian Taxation Office *Dispute management plan 2013-14*, above n 26.

⁷¹ Australian Taxation Office, above n 25.

⁷² Australian Taxation Office, above n 25; Australian Taxation Office *Dispute management plan 2013-14*, above n 26.

Figure 4.4: The Australian Taxation Office’s Mission, Vision, Values and Goals⁷³

Mission
We contribute to the economic and social wellbeing of Australians by fostering willing participation in our tax and superannuation systems.
Vision
We are a leading tax and superannuation administration, known for our contemporary service, expertise and integrity.
Values
We are impartial, committed to service, accountable, respectful and ethical.
Goals
<ul style="list-style-type: none">• Easy for people to participate• Contemporary and tailored service• Purposeful and respectful relationships• Professional and productive organisation.

On comparing the ATO’s objectives for managing and resolving disputes with its mission, vision, values and goals, it appears that the dispute resolution objectives are generally consistent with the aspirations espoused by the ATO’s overall organisational mission, vision, values and goals. Promoting the earlier resolution of disputes is recognised as an important objective for the ATO. Resolving tax disputes earlier saves time and costs for taxpayers and the ATO, and also provides certainty for taxpayers. Early dispute resolution thus contributes to the ATO Mission, to “contribute to the economic and social wellbeing of Australians by fostering willing participation in our tax and superannuation systems.”⁷⁴ The ATO uses a number of strategies and approaches to achieve this, including being “committed to using ADR where appropriate.”⁷⁵

The ATO’s obligations with respect to ADR also come from a further number of sources. The ATO’s model litigant obligations under the Attorney-General’s Legal Services Directions 2005 (Cth) require the ATO to avoid, prevent and limit the scope of legal proceedings, including by

⁷³ Australian Taxation Office “Vision, mission and values statement” (4 September 2014) <<https://www.ato.gov.au/About-ATO/About-us/In-detail/Strategic-direction/ATO-vision,-mission-and-values-statement/>> (last accessed 7 November 2016).

⁷⁴ Australian Taxation Office, above n 73.

⁷⁵ Australian Taxation Office “PS LA 2013/3”, above n 3, at [5].

giving consideration to ADR before initiating legal proceedings.⁷⁶ The Civil Disputes Resolution Act 2011 (Cth) also requires the ATO, as a party to a dispute, to take “genuine steps” to resolve a dispute before commencing proceedings in the Federal Court of Australia.⁷⁷ Genuine steps can include considering whether a dispute can be resolved using ADR.⁷⁸ Under the ATO’s Code of Settlement, resolution of disputes by ADR may be appropriate as part of the “good management” of the tax system, overall fairness and best use of ATO resources.⁷⁹

The disputes system is further aligned with the mission, vision and values of the ATO in the respect that “resolving disputes” was first included as a focus area in the ATO’s Corporate Plan for 2014-18⁸⁰ and there has been further inclusion of the topic in subsequent ATO Corporate Plans.⁸¹ The annually reviewed Corporate Plan sets out the ATO’s priorities for the years ahead in line with its mission, vision and values, with a specific focus on the next 12 months. In addition, as outlined under DSD Principle 12, the dispute resolution system, including the use of ADR, has been included within the organisation’s “Reinventing the ATO” project.

(14) There is evaluation of the system

There is provision for evaluation of the system in the respect that taxpayers can provide general feedback (compliments, complaints and suggestions) to the ATO through various means including online, by phone, fax or mail. In addition, following the completion of certain dispute resolution processes such as the ATO’s facilitation and independent review processes, participants are invited to complete a feedback form to capture their views on the process and to identify areas for improvement.

The ATO regularly engage external market research companies to conduct surveys to monitor perceptions in the community generally, in the business community and among tax professionals about the way they administer the tax system and to gauge satisfaction levels with the way the ATO operate. Accordingly, evaluation of the dispute system is provided by those surveys which relate to stakeholder perceptions on, and satisfaction with, the tax dispute resolution system. For example, a quarterly survey is currently conducted to measure individual and small business taxpayers’ perceptions of fairness following the finalisation of their

⁷⁶ Legal Services Directions 2005 (Cth), Appendix B, ss 5.1 and 2(e)(iii).

⁷⁷ Civil Disputes Resolution Act 2011 (Cth), ss 6 and 7

⁷⁸ Civil Disputes Resolution Act 2011 (Cth) s 4(1)(d).

⁷⁹ Australian Taxation Office “Code of settlement”, above n 27, at [3]; Australian Taxation Office “PS LA 2015/1”, above n 27, at [3].

⁸⁰ Australian Taxation Office *Corporate plan 2014-18* (Canberra, June 2014) at 37-40.

⁸¹ Australian Taxation Office *Corporate plan 2015-19* (Canberra, July 2015) at 5; Australian Taxation Office *Corporate plan 2016-17* (Canberra, August 2016) at 5.

objections.⁸² Evaluation of the system also occurs through one-off surveys or research projects commissioned by the ATO, such as the ACJI's *Evaluating Alternative Dispute Resolution in Taxation Disputes*⁸³ user experience survey conducted by an independent team of ADR experts at Monash University.

Evaluation can further occur through reports issued on inquiries on tax disputes and the tax dispute resolution system conducted by parliamentary committees.⁸⁴ In addition, evaluation of the dispute resolution system is provided by a number of government-appointed entities that examine various aspects relating to how the ATO administer Australia's tax and superannuation systems. These entities include the IGT,⁸⁵ the Australian National Audit Office (ANAO)⁸⁶ and formerly, the Commonwealth Ombudsman.⁸⁷

4.4 Summary of the Author's Evaluations of New Zealand and Australia

Utilising a case study methodology, this chapter has outlined, and then evaluated using DSD principles, the tax dispute resolution procedures of NZ and Australia. From a DSD perspective, the tax dispute resolution systems of NZ and Australia are similar in a number of respects. In both jurisdictions stakeholders are involved in the design process, there is notification before and feedback after the dispute resolution process, forms of training and education are provided to various stakeholders of the system, guidance or assistance is available for choosing appropriate processes and there are various mechanisms for evaluating the dispute resolution system. In addition, both systems have persons available to mentor and provide advice to revenue authority staff on dispute resolution or ADR techniques. However, the two systems do not provide equivalent persons which are available to mentor and provide advice on dispute resolution or ADR techniques for taxpayers.

Both systems are deficient in the respect that they lack multiple structural access points. Taxpayers in both jurisdictions are not provided with the option of choosing between entering the system at the level of internal review and at the level of external appeal. As there is only one structural access point to the procedures, at the outset of a dispute taxpayers do not have

⁸² Australian Taxation Office "Taxpayer perceptions of fairness research" (30 September 2016) <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Annual-research/Perceptions-of-Fairness-in-Disputes-survey/>> (last accessed 7 November 2016).

⁸³ Sourdin and Shanks, above n 1.

⁸⁴ See, for example, House of Representatives Standing Committee on Tax and Revenue, above n 46.

⁸⁵ The IGT reviews potential systemic issues in tax administration and makes recommendations to Government for improvement.

⁸⁶ The ANAO conducts performance audits that examine the efficiency and effectiveness of ATO administration.

⁸⁷ The Commonwealth Ombudsman investigated complaints regarding the fairness of ATO actions and procedures and could independently review any aspect of ATO administration and make recommendations for improvement. However, from 1 May 2015, the tax complaint handling role of the Commonwealth Ombudsman was transferred to the IGT.

the option of by-passing the internal review process and entering the system at the external appeal level.

The systems both provide multiple options in the procedures for addressing conflict, including direct negotiation, internal review, ADR processes and litigation. However, the NZ system differs in the respect that the procedures include the prescribed exchange of documents at certain stages before internal review is conducted by Inland Revenue's DRU (NZ). The NZ system also differs in the respect that ADR is available as an option to taxpayers only through the choice of facilitation at the conference stage of the dispute procedures and potentially, in various forms, in the TRA and the High Court at the litigation stage. In comparison, in Australia taxpayers have the option of choosing to utilise ADR generally at any stage of the dispute procedures, including at the audit, objection and litigation stages.

Notably, in both jurisdictions there was formerly the option for qualifying taxpayers with smaller value disputes to choose to have their disputes dealt with in small claims jurisdictions of the relevant review authority or tribunal. However, this option was abolished in NZ in 2011 and in Australia in 2015. Although, in NZ, the opt-out for disputes meeting certain criteria (including where the total amount in dispute is \$75,000 or less) arguably provides a limited option for certain (small) taxpayers to choose a truncated path in the dispute procedures.

In both jurisdictions taxpayers typically incur high upfront costs in pursuing the dispute procedures as it is generally necessary for taxpayers in tax disputes to have their positions worked out from the outset of the dispute. Notwithstanding the abovementioned high upfront costs, the Australian procedures are arguably ordered in a low to high cost sequence. However, due to the relatively high costs associated with the prescribed exchange of documents occurring at certain stages during the procedures, the NZ procedures are not ordered in a low to high cost sequence.

The Australian system provides loop-back mechanisms through ADR processes being theoretically available at all stages of the dispute process. However, the system does not provide taxpayers with the ability to loop-forward in the procedures. The potential availability to parties of certain forms of ADR in the TRA and the High Court at the litigation stage provide a form of loop-back mechanism in the NZ system. The NZ system also provides a limited loop-forward mechanism through the potential availability of the taxpayer opt-out, from the full dispute process, after the conference phase.

In both jurisdictions there are concerns from stakeholders with respect to the fairness of the dispute procedures as a whole, particularly in relation to the effect of the time and cost of the procedures on small taxpayers. In addition, in the two jurisdictions there are apparent mixed

findings regarding stakeholder perceptions of fairness of revenue authority staff acting as facilitators in the facilitation programs of the revenue authorities.

In Australia, the championship of a dispute resolution culture and a commitment to the use of ADR are recurrent themes in the Australian Commissioner's speeches. The ATO's approach to dispute resolution (including ADR), outlined in its Disputes Policy and Dispute Management Plan, also generally aligns with the ATO's overall mission, vision, values and goals. In contrast, in NZ there is limited evidence of championship of the dispute resolution system by the NZ Commissioner. Moreover, Inland Revenue currently appears reluctant to entertain the further use of ADR over and above its conference facilitation process. In addition, *prima facie*, there is no clear alignment between the purpose of the procedures outlined in s 89A of the TAA 1994 and the overall vision, mission and values of Inland Revenue. However, when the current procedures were first introduced in 1996, there was some recognition by the Richardson Committee that a well-functioning tax dispute resolution system may potentially contribute towards enhancing voluntary compliance.

Both jurisdictions offer training in dispute resolution to relevant revenue authority staff where it is identified as part of their development plans. Inland Revenue, in the latter half of 2015, commenced the additional AMINZ accreditation of its conference facilitators. Nevertheless, the training initiatives in the Australian system arguably appear to be more comprehensive than in the NZ system. In recent times the ATO has introduced a Dispute Management curriculum and as part of its "Reinventing the ATO" project, the ATO has apparently made efforts to train staff at various levels to better communicate with taxpayers during disputes.

In summary, in comparison to the NZ system, the Australian system meets a greater number of the DSD principles of best practice. Moreover, the Australian system provides a greater number of ways in which taxpayers are able to choose a preferred process with respect to opportunities to use ADR. However, most notably, the Australian system appears stronger than the NZ system in terms of fulfilling certain DSD principles which are primarily related to the support and championship of the system. These include aspects such as the championship of the system by senior management and alignment of the system with the overall mission of the organisation. Having evaluated the tax dispute resolution systems of NZ and Australia in this chapter, the next chapter now turns to the DSD evaluation of the tax dispute resolution systems of the UK and the US.

Chapter 5: Case Study Findings: The United Kingdom and the United States¹

5.1 Introduction

This chapter presents the case studies of the United Kingdom (UK) and the United States (US) respectively. Section 5.2 outlines and evaluates the UK tax dispute resolution system, section 5.3 outlines and evaluates the US tax dispute resolution system and section 5.4 summarises and compares the two jurisdictions.

5.2 The United Kingdom

5.2.1 The tax dispute resolution procedures

As illustrated in Figure 5.1, tax disputes in the UK can occur when a taxpayer disagrees with a HM Revenue and Customs (HMRC) decision, such as an amended assessment, usually following a HMRC compliance check. The steps in the UK tax dispute resolution procedures generally involve the following aspects:

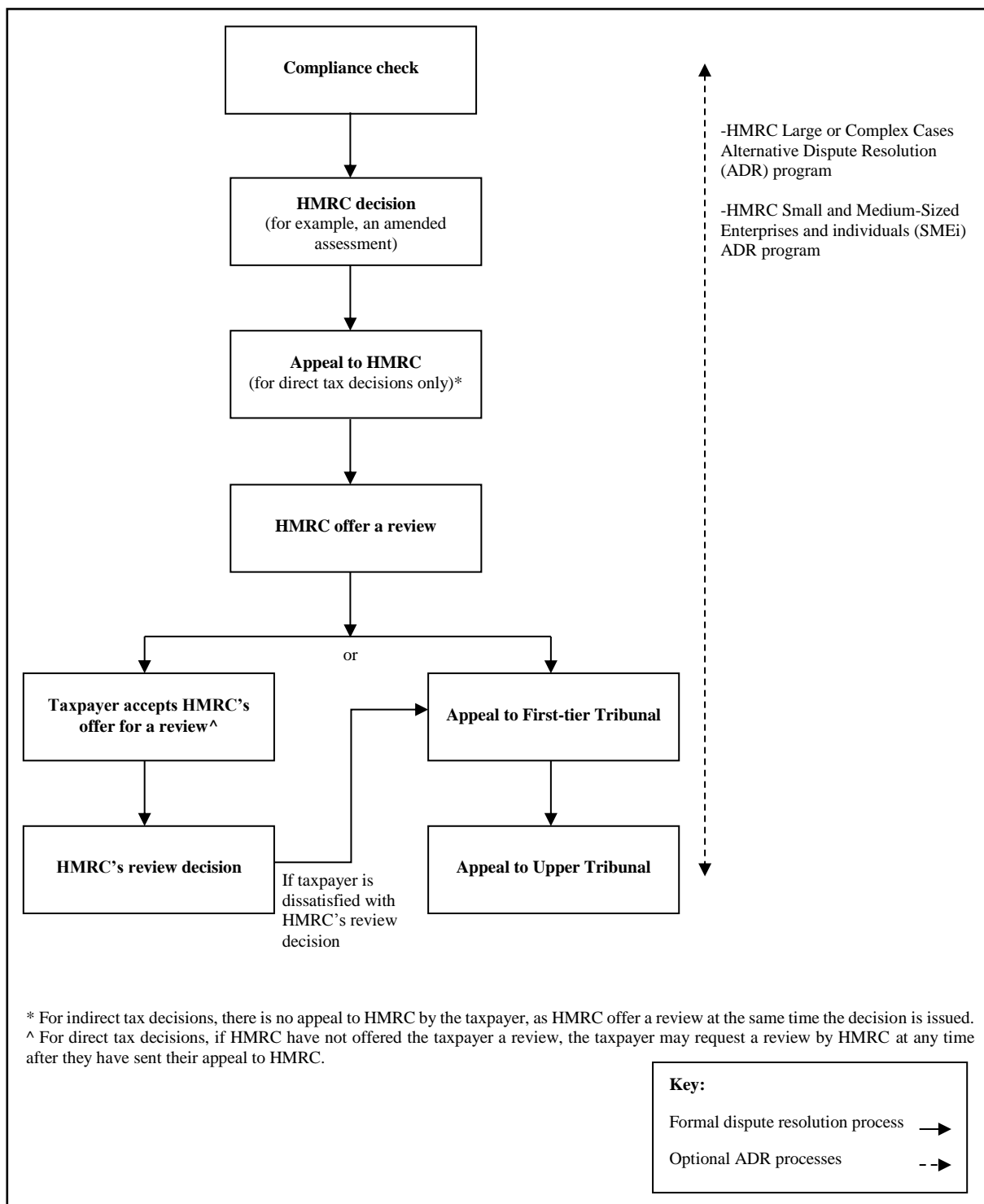
- For HMRC decisions involving direct taxes, an appeal is notified in writing by the taxpayer to HMRC (for indirect tax decisions there is no appeal as HMRC offer a review at the same time as the decision is issued).
- The taxpayer can accept HMRC's offer of (or request) a review of the decision (carried out by a HMRC officer who was not involved in making the HMRC decision).
- The taxpayer may (following the outcome of any such review) notify the appeal to the tribunal.

However, it should be noted that a review by HMRC is not a pre-requisite to appealing to the tribunal. Thus, taxpayers can take their dispute to the tribunal whether or not HMRC has carried out a review (but not while a review is in process). In addition, as indicated in Figure 5.1, taxpayers may also request to use alternative dispute resolution (ADR) to resolve a tax dispute at any stage of the dispute procedures (either before or after a HMRC decision has been issued). The two HMRC ADR programs available are the large or complex cases program (involving facilitation, joint facilitation or mediation) and the Small and Medium-Sized Enterprises and individuals (SMEi) program (involving facilitation).² A more detailed description of the UK tax dispute resolution procedures and its related features is provided in Appendix 1.3 of this thesis.

¹ Material covered in chapter 5 has previously been published in Melinda Jone "What can the United Kingdom's Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective" (2017) 32(1) ATF 59.

² For further details, see section 1.3.2 of Appendix 1.3 of this thesis.

Figure 5.1: The United Kingdom's Tax Dispute Resolution Procedure



5.2.2 Evaluation using dispute systems design principles

(1) Stakeholders are included in the design process

HMRC have included taxpayers in the design process by inviting eligible taxpayers to participate in a number of ADR pilot programs used to test the effectiveness of ADR in resolving tax disputes. HMRC have also involved other external stakeholders, including representatives from the voluntary sector, the legal and accountancy professions and both large and smaller accountancy firms, in the project management of the ADR pilots. In addition, HMRC have included stakeholders in the design process through inviting them to submit comments on draft versions of documents such as the Litigation and Settlement (LSS) commentary³ and ADR practical guidance for HMRC staff.⁴ Tax agents and their representative bodies have typically participated in the design process in this regard.

(2) The system has multiple options for addressing conflict including interests, rights and power-based processes

The UK tax dispute resolution system has multiple options for addressing conflict. The tax dispute resolution system envisages that in most cases tax disputes will be resolved by agreement through discussions between HMRC and the taxpayer in the first instance. If the dispute cannot be resolved through discussions with HMRC the taxpayer can choose to either have a review of the HMRC decision conducted by a HMRC officer not previously involved in the dispute, or they may choose to utilise rights-based litigation processes by appealing to an independent tax tribunal. If the taxpayer chooses to have a review by HMRC, they may still appeal to the tribunal if they disagree with the review outcome. In addition, optional interests-based ADR processes are available at any stage of the formal dispute resolution process (including during the compliance check stage and when an appeal has been lodged with a tribunal). The ADR processes available for taxpayers with large or complex cases are facilitation (including the option for joint facilitation) and mediation, and for SMEi taxpayers, facilitation is available.

(3) The system provides for loops backward and forward

The potential ability to utilise a HMRC ADR program once an appeal has been lodged with the HM Courts and Tribunals Service (the Tribunals Service) (but before the commencement of a tribunal hearing), provides a loop-back from a rights-based option (litigation) back to interests-based processes. The system also provides for loops forward in the respect that a taxpayer may effectively choose to by-pass HMRC's internal review process by choosing not to request a review or by declining HMRC's offer for a review (if one has been made) and appealing

³ HM Revenue and Customs *Resolving tax disputes: Commentary on the litigation and settlement strategy* (November 2013). For further details on the LSS see also, section 1.3.4.1 of Appendix 1.3 of this thesis.

⁴ HM Revenue and Customs *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* (April 2012).

directly to the First-tier Tribunal. This means that taxpayers can move directly to a rights-based option without having to first go through all of the earlier options in the formal dispute process.

The ability, in appropriate cases, during the course of a compliance check under s 28ZA of the Taxes Management Act 1970 (UK), for the taxpayer and HMRC to jointly apply to the tribunal for a binding determination of “any question arising in connection with the subject matter of [a compliance check]” also provides a loop-forward mechanism with respect to the specific matter of the compliance check which the joint application is submitted.

(4) **There is notification before and feedback after the resolution process**

Notification of disputes is implied through HMRC’s *Your Charter* in which HMRC make a general commitment to “Provide a helpful, efficient and effective service.”⁵ Under this commitment, HMRC undertake to, inter alia, “help you understand what you have to do and when you have to do it” and “put any mistakes right as soon as we can.”⁶ Notification also occurs through HMRC’s announcements of campaigns and taskforces which are targeted at tackling tax evasion and avoidance. HMRC campaigns are aimed at specific topics or areas where HMRC believes individuals and businesses are not fully compliant. The campaigns encourage taxpayers to come forward and disclose the irregularities and then enter into a voluntary disclosure arrangement to regularise matters.⁷ Taskforces are specialist teams that focus intensive activity on specific high-risk trade sectors and locations in the UK. The teams visit traders to examine their records and carry out other investigations.⁸ Thus, HMRC’s announcements of the specific areas of focus for its campaigns and taskforces may serve as notification of potential areas where disputes may ultimately arise.

HMRC’s Revenue and Customs Briefs are bulletins which announce changes in policy or set out the legal background to an issue and have a six month lifespan.⁹ Revenue and Customs Briefs may be used by HMRC to outline their position following a court decision. Notwithstanding their limited lifespan, applicable Revenue and Customs Briefs may provide a form of notification to taxpayers and other stakeholders as to HMRC’s view on the implications of a particular court decision.

⁵ HM Revenue and Customs “Your Charter” (12 January 2016) <<https://www.gov.uk/government/publications/your-charter/your-charter#A2>> (last accessed 7 November 2016).

⁶ HM Revenue and Customs, above n 5.

⁷ See, for example, HM Revenue and Customs “Credit Card Sales Campaign” <<https://www.gov.uk/creditcardsales>> (last accessed 7 November 2016); HM Revenue and Customs “Let Property Campaign” <<https://www.gov.uk/let-property-campaign>> (last accessed 7 November 2016); and HM Revenue and Customs “Second Incomes Campaign” <<https://www.gov.uk/secondincomes>> (last accessed 7 November 2016).

⁸ See HM Revenue and Customs *Our approach to tax compliance* (September 2012) at 2.

⁹ Revenue and Customs Briefs are available on HMRC’s website at: HM Revenue and Customs “Revenue and Customs Briefs” <<https://www.gov.uk/government/collections/revenue-and-customs-briefs>> (last accessed 7 November 2016).

Feedback on disputes at the systemic level occurs through the publication of HMRC's Tax Assurance Commissioner's annual report which outlines HMRC's performance in resolving disputes with taxpayers.¹⁰ The Tax Assurance Commissioner's annual report also includes statistics on the number of reviews and appeals received against tax decisions of HMRC and the number of ADR referrals. In relation to feedback at the micro-level on HMRC's ADR programs, this is collected directly by the relevant operational teams which operate ADR in HMRC.¹¹ The feedback collected is used to inform the development of the ADR programs and provide metrics information.

(5) The system has a person or persons who function as internal independent confidential neutral(s)

The relevant HMRC operational teams which operate ADR in HMRC function as HMRC's equivalent of internal independent confidential neutrals within the system which HMRC staff can go to for coaching, referring and problem-solving. The operational teams are separate from the case teams involved in disputes and include "impartial independent full-time mediators."¹² The operational teams provide support to HMRC case owners and Customer Relationship Managers (CRMs) through preparing anonymised case studies as well as feeding back lessons learned to leadership teams and case teams, and reporting on broad trends.¹³ Given that HMRC operational mediators "never ... act as advocates for a party in a dispute",¹⁴ arguably there are no internal independent confidential neutrals in the system for taxpayers. Although, taxpayers do have the option of seeking advice and support on dispute resolution matters externally from professional advisors at their own expense. This would be similar to taxpayers seeking the assistance of professional advisors on tax technical matters in relation to tax disputes.

(6) Procedures are ordered from low to high cost

The formal dispute procedures can be viewed as being ordered in a low to high cost sequence in the respect that there is the opportunity for direct negotiation in the first instance, followed by HMRC's internal review process and then the potential to appeal to an independent tribunal. This sequence generally implies an increase in costs at each level, particularly when the dispute is escalated to the tribunal level. Nevertheless, the option to use HMRC's ADR programs where

¹⁰ The Tax Assurance Commissioner's annual reports are available at: HM Revenue and Customs "How we resolve tax disputes" <<https://www.gov.uk/government/collections/how-we-resolve-tax-disputes>> (last accessed 7 November 2016).

¹¹ Email from [redacted] (Executive Director, [redacted], London) to Melinda Jone regarding HMRC Tax Assurance and Resolution Policy and HMRC ADR (3 August 2016).

¹² Email from [redacted] (Technical Manager and Editor, [redacted], London) to Melinda Jone regarding HMRC ADR (3 August 2016).

¹³ Email from [redacted] (Assistant Director, [redacted], HM Revenue and Customs) to Melinda Jone regarding HMRC Tax Assurance and Resolution Policy (5 August 2016).

¹⁴ Email from [redacted] (Assistant Director, [redacted], HM Revenue and Customs) to Melinda Jone regarding HMRC Tax Assurance and Resolution Policy (17 August 2016).

appropriate, at any stage of the procedures, can add further costs at the stage of the dispute process at which ADR is utilised. While taxpayers are generally not charged a fee for using HMRC facilitators,¹⁵ costs may nevertheless be incurred by taxpayers in preparing for and participating in ADR as well as for any professional representation and advice sought. However, if the dispute is resolved through ADR at this stage of the dispute process, then the parties will not subsequently have to move further up the system to higher cost processes.

Similar to the tax dispute resolution processes of the other jurisdictions in this study, the tax dispute resolution process in the UK can require substantial upfront costs from the taxpayer (for example, the time spent by the taxpayer in preparing for, and participating in negotiations as well as the cost of professional advisors). This suggests that, notwithstanding the apparent low to high cost sequence of the formal dispute procedures identified above, the initial upfront costs for the taxpayer may not greatly differ in relation to the stage of the dispute process that the dispute is ultimately resolved at.

(7) The system has multiple access points

The formal disputes system has multiple structural entry points for certain taxpayers only. For taxpayers with disputes involving direct taxes, taxpayers must make an appeal to HMRC in the first instance. Thus, there is only one structural entry point to the disputes system for these taxpayers. However, at any time after sending their appeal to HMRC, the taxpayer may request for an internal review by HMRC or appeal externally to the tribunal. For disputes involving indirect taxes, taxpayers do not need to make an appeal to HMRC. Thus, there are multiple entry points for these taxpayers as they may enter the disputes system at either the HMRC internal review level or at the level of external appeal to the tribunal.

Procedurally, the means by which taxpayers can enter the system at each of the above structural entry points are as follows. Appeals to HMRC (for direct tax disputes) must be sent to HMRC in writing using either the appeal form provided by HMRC or by letter. Requests for (or acceptances of) HMRC reviews must be sent in writing to HMRC. Appeals to the tribunal must be made by completing a tribunal application form (Notice of Appeal) and sent to the Tribunals Service by post or email.¹⁶

¹⁵ There is no cost for utilising HMRC facilitators for the facilitation processes in both the large or complex cases and SMEi ADR programs. However, where joint facilitation is utilised in the large or complex cases program, the taxpayer's facilitator is paid for by the taxpayer.

¹⁶ In November 2016 the UK Ministry of Justice announced plans to trial (and then subsequently launch) a new digital service which will allow taxpayers to submit an appeal to an independent tax tribunal online. The service will be made available for all types of tax disputes with HMRC as an alternative option to using the current paper-based application form (which will still remain available). For further details, see section 1.3.1 of Appendix 1.3 of this thesis. Once launched, this would provide an additional procedural access point for taxpayers to enter the system.

The system also offers a choice of access persons to whom certain system users can approach in the first instance in the respect that, for taxpayers who do not speak English as their first language, HMRC offer a free language translation service (or alternatively, a taxpayer may choose to have a friend or family member interpret on their behalf).¹⁷ In addition, taxpayers who are deaf, hard of hearing or have a speech impairment can contact HMRC by text relay or by a textphone service.¹⁸ While these methods provide a choice of persons for certain taxpayers to contact HMRC generally, they arguably may also act to provide a choice of persons for whom certain taxpayers can access to acquire knowledge of or information on the dispute resolution system in the first instance.

For taxpayers who are blind, partially sighted or require written information in alternative formats, HMRC produce most paper forms, leaflets and information (including those relating to reviews and appeals) in alternative formats such as Braille, large print, audio on CD, text on CD and email.¹⁹ These options arguably provide multiple forms of access points to the system for the applicable taxpayers.

Under the Welsh Language Act 1993 (UK), in the conduct of its business with the public, HMRC treat the English and Welsh languages on a basis of equality.²⁰ The public are offered a choice of English or Welsh by HMRC at all points of contact in Wales. Welsh language publications, forms and correspondence, a Welsh language helpline and Welsh language website are available. Thus, the choice between English and Welsh arguably may constitute the provision of multiple forms of accessing the dispute system for certain taxpayers.

(8) The system includes training and education for stakeholders

HMRC's website (which is part of the UK government website) contains a number of webpages that provide information for taxpayers on how to appeal against HMRC decisions,²¹ appeal to the tax tribunal²² and ways to resolve disputes using ADR.²³ Also available on HMRC's website is a series of factsheets on topics including: HMRC compliance checks; what

¹⁷ HM Revenue and Customs "Dealing with HMRC if you have additional needs" (1 July 2016) <<https://www.gov.uk/dealing-hmrc-additional-needs>> (last accessed 7 November 2016).

¹⁸ HM Revenue and Customs, above n 17.

¹⁹ HM Revenue and Customs, above n 17.

²⁰ HM Revenue and Customs "HMRC internal manual – Self Assessment Manual: Manage work: customer service: welsh language service" <<https://www.gov.uk/hmrc-internal-manuals/self-assessment-manual/sam70160>> (last accessed 7 November 2016).

²¹ HM Revenue and Customs "Disagree with a tax decision" (25 October 2016) <<https://www.gov.uk/tax-appeals/overview>> (last accessed 7 November 2016).

²² HM Revenue and Customs "Appeal to the tax tribunal" (25 October 2016) <<https://www.gov.uk/tax-tribunal>> (last accessed 7 November 2016).

²³ HM Revenue and Customs "Tax disputes: Alternative Dispute Resolution (ADR)" (8 December 2014) <<https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr>> (last accessed 7 November 2016).

you can do if you disagree with an HMRC decision; and ADR.²⁴ These factsheets provide general guidance for taxpayers on the relevant topics.

HMRC further provide education on the dispute system and how to access it for tax agents and advisors. This includes the “Appeals and tribunals: an overview for agents and advisers” webpage that provides guidance for tax agents and advisors on appeals and tribunals.²⁵ In addition, HMRC’s Learning Together training material and resources for tax agents and advisors includes an online learning module for these stakeholders on HMRC’s reviews and appeals process.²⁶

For HMRC staff, the Appeals Reviews and Tribunal Guidance (ARTG) manual is an HMRC internal manual which provides technical guidance for all instances where a customer disagrees with a HMRC tax decision.²⁷ The ARTG is updated regularly to reflect new processes and how they will be applied. Other HMRC publications which provide guidance and information in relation to dispute resolution for HMRC staff (and taxpayers) include: *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases*;²⁸ *Resolving tax disputes: Commentary on the litigation and settlement strategy*;²⁹ and the *Code of governance for resolving tax disputes* (Code of Governance).³⁰

In line with HMRC’s collaborative working approach (discussed further under DSD Principle 13 below), HMRC officers are trained to work “collaboratively where possible” as part of their

²⁴ See HM Revenue and Customs *General information about compliance checks* (CC/FS1a, November 2015); HM Revenue and Customs *HM Revenue and Customs (HMRC) decisions – what you can do if you disagree* (HMRC1, February 2016); HM Revenue and Customs *Alternative Dispute Resolution* (CC/FS21, October 2015). These factsheets are available at: HM Revenue and Customs “HM Revenue and Customs: leaflets, factsheets and booklets” (20 October 2014) <<https://www.gov.uk/government/collections/hm-revenue-and-customs-leaflets-factsheets-and-booklets>> (last accessed 7 November 2016).

²⁵ HM Revenue and Customs “Appeals and tribunals: an overview for agents and advisers (1 January 2014) <<https://www.gov.uk/appeals-and-tribunals-an-overview-for-agents-and-advisers>> (last accessed 7 November 2016).

²⁶ Available at: HM Revenue and Customs “Webinars, e-learning and videos if you’re a tax agent or adviser” (16 December 2014) <<https://www.gov.uk/government/news/webinars-e-learning-and-videos-if-youre-a-tax-agent-or-adviser>> (last accessed 7 November 2016).

²⁷ In accordance with the Freedom of Information Act 2000 (UK), the ARTG manual is also made available by HMRC on the internet for taxpayers and their advisors at: HM Revenue and Customs “HMRC internal manual – Appeals reviews and tribunals guidance” <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance>> (last accessed 7 November 2016).

²⁸ HM Revenue and Customs, above n 4.

²⁹ HM Revenue and Customs, above n 3.

³⁰ HM Revenue and Customs *Code of governance for resolving tax disputes* (July 2014). This document sets out HMRC’s internal governance arrangements for decisions on how tax disputes should be resolved. For further details see also, section 1.3.4.2 of Appendix 1.3 of this thesis.

compliance training.³¹ Interpersonal skills are also highlighted as part of this training.³² In relation to the training of the facilitators utilised in HMRC's ADR programs, the HMRC facilitators in the large or complex cases ADR program are externally trained and accredited by the Centre for Effective Dispute Resolution (CEDR) in mediation techniques. While the HMRC facilitators utilised in the SMEi ADR program receive in-house training in dispute resolution skills from HMRC instructors.

(9) Assistance is offered for choosing the best process

The ARTG manual provides guidelines for the review and appeal processes for both direct and indirect taxes to ensure the most appropriate use of processes in the dispute resolution procedures. In relation to guidance on the appropriate use of ADR, *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the use of Alternative Dispute Resolution in Large or Complex Cases* outlines the types of cases where ADR is likely to be appropriate and the sorts of cases where ADR is unlikely to be suitable.³³

Process advisors are included in the system in a number of ways. Large business taxpayers considering ADR must generally contact their HMRC CRM or case owner to discuss ADR in the first instance. In 2015-16 operational responsibility for ADR passed from HMRC's former Dispute Resolution Unit (DRU (UK))³⁴ to operational teams within HMRC.³⁵ The operational teams have processes in place to consider and evaluate all the requests HMRC receives for ADR, and experienced facilitators are integral to considering the suitability of ADR. Where they are of the view that a case is not suitable for ADR, it is referred to a governance panel for consideration.³⁶ Taxpayers can also email the relevant HMRC operational teams to ask for additional information on HMRC ADR or if they have questions on whether ADR is suitable for their dispute.

(10) Disputants have the right to choose a preferred process

Taxpayers have the right to choose a preferred process in the respect that they can choose to pursue the dispute process by either requesting (or accepting HMRC's offer of) a review or notifying their appeal to the tribunal. Thus, the system is multi-option in the respect that taxpayers can choose to have a review of HMRC's decision or notify their appeal to the tribunal

³¹ Email from [redacted] (Senior Policy Advisor, [redacted], HM Revenue and Customs) to Melinda Jone regarding HMRC ADR (8 July 2014).

³² Email from [redacted] (Senior Policy Advisor, [redacted], HM Revenue and Customs), above n 31.

³³ HM Revenue and Customs, above n 4, at 7-12.

³⁴ The DRU (UK) merged with other areas in HMRC in January 2016 and is now known as Tax Assurance and Resolution Policy (TARP).

³⁵ HM Revenue and Customs *How we Resolve Tax Disputes: The Tax Assurance Commissioner's Annual Report 2015-16* (July 2016) at 6.

³⁶ At 6.

or do both. However, as noted earlier, if a taxpayer chooses to have a review of HMRC's decision, they may only notify their appeal to the tribunal once the review has finished and they are dissatisfied with the review outcome.

Taxpayers also have the right to choose a preferred process in the respect that ADR is available as an option alongside taxpayers' existing rights for a review by HMRC or to appeal to an independent tax tribunal. In addition, entering into ADR does not affect the taxpayer's review or appeal rights if the dispute remains unresolved following ADR. Although, if ADR is entered into after a HMRC decision is issued, it is important that the taxpayer separately considers (and actions, where appropriate) any appeal of the HMRC decision within the relevant time limit.

Also worth noting is that when an appeal is notified to the tribunal, the tribunal will allocate the case to one of the following categories: default paper cases, basic cases, standard cases or complex cases.³⁷ However, as the initial allocation is made by the tribunal, the disputants themselves cannot select a preferred process in this regard.³⁸

(11) The system is fair and perceived as fair

Perceptions of fairness of the UK dispute resolution system in recent times have been centered on issues relating to HMRC's governance processes for settling large tax disputes. These issues arguably consequently impact upon "foster[ing] a culture that welcomes good faith dissent" in the dispute resolution system.³⁹

The National Audit Office (NAO)⁴⁰ reported in 2011 on HMRC's handling of tax disputes with large businesses and concluded that HMRC's governance processes for resolving tax disputes were sound and that these were followed in a substantial majority of the 27 cases examined.⁴¹ However, it noted five cases in which the normal governance processes had not been followed and one case in which an error had been made in calculating liabilities. The Public Accounts Committee (PAC)⁴² followed up these issues in hearings held during October and November 2011. In its report on these hearings, released in December 2011, the PAC made a number of

³⁷ For further details, see section 1.3.1 of Appendix 1.3 of this thesis.

³⁸ Although, either on its own initiative or upon the application of HMRC or a taxpayer, the tribunal may re-allocate a case to a different category: Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), r 23(3).

³⁹ Society of Professionals in Dispute Resolution *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations* (Washington DC, 2001) at 10.

⁴⁰ The NAO is an independent Parliamentary body in the UK responsible for auditing central government departments, government agencies and non-departmental bodies. The audit and inspection rights are vested in the head of the NAO, the Comptroller and Auditor General.

⁴¹ National Audit Office *Report by the Comptroller and Auditor General on HM Revenue and Customs 2010-2011 Accounts* (The Stationery Office, 7 July 2011) HC 981.

⁴² The PAC is a select committee of the British House of Commons responsible for overseeing government expenditures to ensure they are effective and honest.

critical findings and recommendations for change in HMRC's handling of large tax disputes.⁴³ A further report was issued by the NAO in June 2012 following an in-depth review of the five cases highlighted in the NAO's 2011 report.⁴⁴ The NAO's 2012 report concluded that those cases had all led to reasonable outcomes for the Exchequer. However, the NAO noted that:⁴⁵

There is a strong case for improving the processes for reaching these settlements, particularly separation of roles in negotiating and authorising settlements. It is not appropriate to set up specific governance arrangements, or to fail to apply processes correctly and there is a need for stronger assurance that the Department has applied its processes correctly.

The above findings consequently led to allegations of “cosiness” by HMRC with big business and the perception – promoted by sections of the media – that large corporates were receiving “generous tax concessions not available to ordinary taxpayers.”⁴⁶ As a result, accepting that there was a need to restore public confidence and perceptions of fairness in the way HMRC handled tax disputes, HMRC implemented a number of changes to strengthen HMRC's governance of significant tax disputes and improve its transparency and accountability. To improve the governance of tax disputes, HMRC has:⁴⁷

- mandated a clear separation of powers between those working on a settlement case and those responsible for approving it;
- appointed a Tax Assurance Commissioner to oversee large tax settlements;
- introduced risk-based arrangements to scrutinise and approve tax settlements, in each part of its business. HMRC refers major disputed points or issues affecting multiple cases to cross-HMRC panels to promote consistency; and
- established independent scrutiny by internal audit of completed settlements.

To improve transparency and accountability:⁴⁸

- The Tax Assurance Commissioner has published annual reports describing HMRC's work, its progress in resolving major disputes, and how its new governance arrangements are working.

⁴³ House of Commons Committee of Public Accounts *HM Revenue & Customs 2010-11 Accounts: Tax Disputes: Sixty-First Report of Session 2010-12* (The Stationery Office, 20 December 2011) HC 1531.

⁴⁴ National Audit Office *HM Revenue and Customs: Settling Large Tax Disputes: Report by the Comptroller and Auditor General* (The Stationery Office, 12 June 2012) HC 188.

⁴⁵ At 9.

⁴⁶ Jason Collins and Ian Hyde “Tax Disputes: HMRC's code of governance” (2012) 14 PM-Tax 12 at 12.

⁴⁷ National Audit Office *Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (The Stationery Office, 6 February 2015) HC 1029-1 at 17, [3.7]

⁴⁸ At 17, [3.8].

- HMRC has published and revised its Code of Governance. It has also updated and clarified its LSS and published a detailed commentary to support it.

In 2015, the NAO issued a report on the progress made by HMRC since 2010 in tax collection.⁴⁹ The report focused in particular on how HMRC had responded to recommendations in key areas of focus by the NAO and PAC, including the settlement of large tax disputes. The NAO concluded that:⁵⁰

The appointment of a tax assurance commissioner and the publication of his annual reports are welcome changes that have significantly improved public confidence in how HMRC deals with large companies.

Nevertheless, issues with respect to the robustness, and resulting fairness perceptions, of HMRC's approach towards corporate tax settlements have continued. In January 2016 Google announced that it had reached agreement with HMRC to pay an additional amount of £130 million in corporation tax and interest following a HMRC investigation which started in 2010.⁵¹ The PAC subsequently published a report on corporate tax settlements which stated: "The small amount of tax paid in proportion to the scale of Google's UK activities means that there are legitimate questions about this settlement."⁵² The PAC concluded that the "lack of transparency about tax settlements makes it impossible to judge whether HMRC has settled this case for the right amount of tax."⁵³ They further noted that:⁵⁴

The public is highly sceptical about whether large businesses pay the corporation tax they should in the UK, and HMRC must address this if it is to protect the integrity of the tax system.

With respect to the fairness of HMRC's ADR programs, there appears to be mixed findings on the perceptions of fairness of the HMRC facilitators utilised. HMRC maintain that "HMRC facilitators have proven to be objective and even handed for all types of customer."⁵⁵ Personal correspondence by the researcher with a number of UK practitioners indicates generally

⁴⁹ National Audit Office, above n 47.

⁵⁰ At 18, [3.9].

⁵¹ See Kevin Rawlinson "Google agrees to pay British authorities £130 in back taxes" *The Guardian* (online ed, London, 23 January 2016).

⁵² House of Commons Committee of Public Accounts *Corporate Tax Settlements: Twenty-Fifth Report of Session 2015-16* (The Stationery Office, 23 February 2016) HC 788 at 5.

⁵³ At 5.

⁵⁴ At 5.

⁵⁵ HM Revenue and Customs *Alternative Dispute Resolution in Large or Complex Cases: Pilot Evaluation Summary* (September 2013) at 8 and HM Revenue and Customs *Alternative Dispute Resolution for SMEs and Individuals: Project Evaluation Summary* (April 2013) at 8.

positive perceptions of fairness of HMRC facilitators.⁵⁶ Although, some taxpayers have concerns about the independence of the facilitator because they are a member of HMRC staff. They are concerned about the facilitator's "ability to 'move' or be strong with the HMRC team on a mediation day."⁵⁷ However, "in larger cases the issue tends to be avoided by using co-facilitators, one from HMRC and another for the taxpayer side."⁵⁸ Anecdotal evidence additionally suggests that a general lack of awareness about how and when to use ADR could lead to scepticism in some practitioners and taxpayers about HMRC's ADR programs and "in general, many practitioners had not yet grasped the significance of ADR in tax disputes going forward."⁵⁹

(12) The system is supported by top managers

There appears to be limited visible evidence of the championship of the UK tax dispute resolution system in the form of published speeches and other media releases by certain members of HMRC senior management, such as the Executive Chair and Permanent Secretary, and the Chief Executive and Permanent Secretary.⁶⁰ Although, arguably there is some evidence of support for the dispute resolution system resulting from the creation of the role of the Tax Assurance Commissioner in July 2012. The Tax Assurance Commissioner reports directly to the Executive Chair and is responsible for: seeing that tax disputes are resolved efficiently and on a basis that determines the correct tax in accordance with the LSS and achieves outcomes that are even-handed across different customer groups; ensuring that HMRC have appropriate governance arrangements in place to meet those objectives; ensuring that those arrangements are observed in practice in individual cases; and monitoring and evaluating the effectiveness of HMRC's processes for resolving tax disputes and its governance arrangements, and implementing improvements.⁶¹ In addition, as noted earlier, the Tax Assurance Commissioner's responsibilities includes the publication of an annual report on HMRC's tax settlement work. Thus, it would be expected that some degree of championship of the dispute resolution system would accompany the above responsibilities of the Tax Assurance Commissioner.

⁵⁶ Email from [redacted] (Barrister and Mediator, [redacted], London) to Melinda Jone regarding HMRC facilitation (4 May 2015); Email from [redacted] (Partner in Tax Dispute Resolution, [redacted], London) to Melinda Jone regarding HMRC facilitation (7 May 2015); Email from [redacted] (Director, [redacted], London) to Melinda Jone regarding HMRC facilitation (27 May 2015).

⁵⁷ Email from [redacted] (Partner in Tax Dispute Resolution, [redacted], London), above n 56.

⁵⁸ Email from [redacted] (Director, [redacted], London), above n 56.

⁵⁹ Rachael Power "ADR proving more relevant for smaller cases" (13 February 2014) AccountingWEB.co.uk <<http://www.accountingweb.co.uk/blog-post/adr-more-successful-small-medium-size-cases>> (last accessed 7 November 2016).

⁶⁰ See HM Revenue and Customs "Announcements" <<https://www.gov.uk/government/announcements?departments%5B%5D=hm-revenue-customs>> (last accessed 7 November 2016).

⁶¹ HM Revenue and Customs, above n 30, at 4.

However, notwithstanding the extensive pilot testing of ADR by HMRC, there appears to have been limited visible championship by HMRC of its ADR programs since the announcements made by HMRC, in September 2013, of their decisions to move ADR for both large or complex cases and SMEi's into "business as usual." Personal correspondence with a HMRC senior policy advisor by the researcher additionally indicates that, notwithstanding a number of "HMRC supported" articles in the UK press highlighting the role of ADR in HMRC,⁶² there has been no formal publicity campaign for HMRC ADR.⁶³

(13) The system is aligned with the mission, vision and values of the organisation

The disputes system is integrated into the organisation in various ways, including through HMRC's *Your Charter* which contains a commitment by HMRC to "deal with your complaints or appeals as quickly as we can."⁶⁴ In practice, the options for taxpayers if they wish to appeal against a HMRC decision are those summarised under DSD Principle 2 of this section. The tax dispute resolution system is also integrated into the organisation through the LSS.⁶⁵ The LSS sets out HMRC's overall approach to resolving tax disputes through civil procedures, subject to the over-riding authority of the Commissioners of HMRC as defined in legislation⁶⁶ and set out in the Code of Governance.⁶⁷ It outlines that HMRC seeks to resolve tax disputes through civil procedures:⁶⁸

- (a) consistently with the law, whether by agreement with the customer or through litigation; and
- (b) consistently with HMRC's customer-centric business strategy objectives of maximising revenue flows, whilst at the same time reducing costs and improving customer experience.

The LSS also provides that HMRC are committed to using a collaborative dispute resolution approach wherever possible in order to handle and resolve disputes as efficiently as practicable.⁶⁹ A collaborative approach "requires both HMRC and the customer (and any agent,

⁶² See, for example, Adam Palin "Taxman starts talking to resolve tax disputes" *Financial Times* (online ed, London, 11 December 2015).

⁶³ Email from [redacted] (Senior Policy Advisor, [redacted], HM Revenue and Customs) to Melinda Jone regarding HMRC ADR (31 December 2015).

⁶⁴ HM Revenue and Customs, above n 5.

⁶⁵ HM Revenue and Customs, above n 3, at Annex 1.

⁶⁶ The collection and management powers of the UK Commissioner set out in s 5 of the Commissioners for Revenue and Customs Act 2005 (UK) confer discretion on the UK Commissioner on whether to litigate to resolve a tax dispute that arises with a taxpayer or whether to settle.

⁶⁷ HM Revenue and Revenue and Customs, above n 30.

⁶⁸ HM Revenue and Customs, above n 3, at Annex 1, [1].

⁶⁹ At Annex 1, [9].

where relevant) to work together on a cooperative, non-adversarial basis in order to resolve a dispute.”⁷⁰

The overall mission, vision and values of HMRC are articulated through its Mission Statement and Strategic Objectives as updated in 2016 (see Figure 5.2):

Figure 5.2: HM Revenue and Customs’ Mission Statement and Strategic Objectives⁷¹

Our Mission Statement:

We are the UK’s tax, payments and customs authority, and we have a vital purpose: we collect the money that pays for the UK’s public services and help families and individuals with targeted financial support.

We do this by being impartial and increasingly effective and efficient in our administration. We help the honest majority to get their tax right and make it hard for the dishonest minority to cheat the system.

Our Objectives:

- Maximise revenues due and bear down on avoidance and evasion
- Transform tax and payments for our customers
- Design and deliver a professional, efficient and engaged organisation.

Thus, it appears that the LSS generally aligns with HMRC’s strategic objectives in the respect that it considers: the overall effectiveness of disputes handling to maximise revenue flows; how to reduce the scope for disputes arising and settle those that do arise as quickly and efficiently as possible to improve customer experience; and the efficiency of disputes handling to reduce costs.⁷² Notwithstanding the above, the LSS arguably restricts the use of ADR as a means of resolving disputes as the LSS “binds HMRC to litigate where the perceived chance of success at tribunal is better than evens, unless the taxpayer settles in full first.”⁷³ Additionally, HMRC guidance for staff on the use of ADR sets out that, under the LSS:⁷⁴

HMRC will seek to handle disputes non-confrontationally and by working collaboratively with the customer wherever possible. In the vast majority of cases, this will involve

⁷⁰ At 18. For further details on the collaborative working approach, see section 1.3.4.1 of Appendix 1.3 of this thesis.

⁷¹ See HM Revenue and Customs “About us” <<https://www.gov.uk/government/organisations/hm-revenue-customs/about>> (last accessed 7 November 2016).

⁷² HM Revenue and Customs, above n 3, at 6.

⁷³ Adam Palin “Keeping disputes out of the courtroom” *Financial Times* (online ed, London, 24 April 2015).

⁷⁴ HM Revenue and Customs, above n 4, at 4.

disputes being settled through bilateral discussion/agreement between the parties or litigation, without recourse to ADR.

While acknowledging that “ADR also presupposes a collaborative working approach”, the HMRC guidance states that “ADR is a toolkit to be used sparingly within [HMRC’s] normal way of working.”⁷⁵ Furthermore, as noted under DSD Principle 12, the apparent lack of visible promotion of HMRC’s ADR programs in practice, arguably also questions the degree of emphasis placed on the use of ADR within HMRC.

The current HMRC *Your Charter Annual Report*, an annual report covering HMRC’s delivery against *Your Charter* including progress and priorities for further improvement, contains brief mention of “a new e-learning product about the litigation and settlement strategy and alternative dispute resolution skills” for HMRC staff.⁷⁶ This forms part of HMRC’s aim to “continue to develop our people and services to meet Charter commitments.”⁷⁷ Nonetheless, the dispute resolution system and ADR are not aspects that feature in HMRC’s *Single Departmental Plan 2015 to 2020*,⁷⁸ which describes HMRC’s priority objectives for 2015 to 2020 as agreed with the Cabinet Office and HM Treasury. Furthermore, similar to the revenue authorities in the other three jurisdictions in this study (see chapter 1, section 1.2.1 of this thesis), HMRC is currently undertaking a “ten-year modernisation programme to create a tax authority fit for the future.”⁷⁹ To “provide customers with better services” is at the heart of the modernisation programme.⁸⁰ However, to date, no plans specifically regarding the dispute resolution system appear to have been publically made as part of the modernisation programme.

⁷⁵ At 6. Contrast with the approach of the Australian Taxation Office (ATO), as outlined in chapter 4, section 4.3.2 of this thesis: “When disputes cannot be resolved by early engagement and direct negotiation, the ATO is committed to using ADR where appropriate to resolve disputes.” See Australian Taxation Office “Practice Statement Law Administration 2013/3: Alternative Dispute Resolution (ADR) in ATO Disputes” (2013) <<http://law.ato.gov.au/atolaw/view.htm?locid=PSR/PS20133/NAT/ATO>> (last accessed 7 November 2016) at [5].

⁷⁶ HM Revenue and Customs *Your Charter Annual Report: April 2015-March 2016* (July 2016) at 17.

⁷⁷ At 17.

⁷⁸ HM Revenue and Customs “Single departmental plan 2015 to 2020” (24 May 2016) <<https://www.gov.uk/government/publications/hmrc-single-departmental-plan-2015-to-2020/single-departmental-plan-2015-to-2020>> (last accessed 7 November 2016). The single departmental plan replaces HMRC’s former Business Plan.

⁷⁹ HM Revenue and Customs “HMRC announces next step in its ten-year modernisation programme” (23 November 2015) <<https://www.gov.uk/government/publications/issue-briefing-hmrc-announces-next-step-in-its-ten-year-modernisation-programme/hmrc-announces-next-step-in-its-ten-year-modernisation-programme-to-become-a-tax-authority-for-the-future>> (last accessed 7 November 2016). See also, HM Revenue and Customs *Making tax digital* (December 2015).

⁸⁰ HM Revenue and Customs “HMRC announces next step in its ten-year modernisation programme”, above n 79.

(14) There is evaluation of the system

There is evaluation of the system at the ADR policy level in the respect that HMRC's TARP team "evaluate ADR services and outcomes in its governance role and in its reporting of ADR in the Tax Assurance Commissioner's Annual Report."⁸¹ In addition, evaluation of the system is provided for in relation to HMRC's ADR programs in that, as noted under DSD Principle 4, following the conclusion of a facilitation or mediation process, HMRC's ADR operational teams contact the parties to obtain confidential feedback on the ADR process. This feedback is used to improve processes in the future. Evaluation of HMRC's ADR programs has also occurred through the project evaluation summaries published by HMRC following the conclusion of the large or complex cases and the SMEi ADR pilot programs.⁸²

Further evaluation of the system occurs through regular and one-off survey research commissioned by HMRC. For example, between 2010 and 2014 HMRC ran an annual Large Business Panel Survey.⁸³ Conducted for HMRC by an independent research agency, the survey looked at, inter alia, large business customers' experiences of dealing with HMRC including their experiences of dispute resolution with HMRC. A one-off research project, *Statutory Review Process*, was also commissioned by HMRC in 2014 to understand customers' experiences and perceptions of the current HMRC internal review process.⁸⁴

As indicated above, HMRC's Tax Assurance Commissioner's annual reports provide a form of evaluation of HMRC's performance in resolving disputes with taxpayers and also make suggestions for improvements to the system. External evaluation of the disputes system (and its governance arrangements) is provided in the respect that the disputes system subject to a high level of scrutiny by the NAO and parliamentary committees, such as the PAC and the Treasury Select Committee.⁸⁵

⁸¹ Email from [redacted] (Senior Policy Advisor, [redacted], HM Revenue and Customs) to Melinda Jone regarding HMRC Tax Assurance and Resolution Policy (6 August 2016).

⁸² HM Revenue and Customs *Alternative Dispute Resolution in Large or Complex Cases: Pilot Evaluation Summary*, above n 55; and HM Revenue and Customs *Alternative Dispute Resolution for SMEs and Individuals: Project Evaluation Summary*, above n 55.

⁸³ See, for example, IFF Research *Large Business Panel Survey 2014* (HM Revenue and Customs Research Report 354, July 2015). In 2016, the Large Business Survey replaced the Large Business Panel Survey. However, the Large Business Survey does not look at large businesses' experiences with dispute resolution.

⁸⁴ HM Revenue and Customs *Research Report: Statutory Review Process* (August 2014).

⁸⁵ See, for example, National Audit Office, above n 41; House of Commons Committee of Public Accounts, above n 43; National Audit Office, above n 44; National Audit Office, above n 47; and House of Commons Committee of Public Accounts, above n 52.

5.3 The United States

5.3.1 The tax dispute resolution procedures

Tax disputes in the US generally arise through the Internal Revenue Service's (IRS's) examination (audit) process. Tax disputes can also arise when a taxpayer disagrees with a proposed or taken IRS collection action.⁸⁶ In instances where the taxpayer does not agree with any or all of the IRS findings in an examination procedure, they may request a meeting or a telephone conference with the IRS examiner and/or the examiner's supervisor. If no agreement is reached at the meeting, the US tax dispute resolution procedures generally involve the following steps:

- A 30-day letter is issued by the IRS notifying the taxpayer of their rights to appeal to the IRS Appeals Office within 30 days.
- If the taxpayer makes an appeal, the IRS Appeals Office will review the issues of the case and schedule a conference (the Appeals conference) between the parties so that they can attempt to settle the differences between them.
- If the taxpayer and the IRS do not agree on some or all of the issues after the Appeals conference, or if the taxpayer does not respond to the 30-day letter (that is, chooses to by-pass the IRS Appeals system), a 90-day letter is issued by the IRS.
- The taxpayer has 90 days (150 days if it is addressed to a taxpayer outside the US) from the date of the 90-day letter to file a petition with the US Tax Court, the US District Court or the US Court of Federal Claims.

In addition, as shown in Figure 5.3,⁸⁷ the IRS Appeals Office offers a number of ADR programs⁸⁸ for certain types of taxpayers to resolve tax disputes during the examination (for example, Fast Track Settlement (FTS) and Early Referral (ER)), collection (for example, Fast Track Mediation – Collection (FTMC))⁸⁹ and appeals stages of the dispute process (for

⁸⁶ As indicated in Figure 5.3, the tax dispute resolution procedures for disputes arising from IRS examination and IRS collection differ. The DSD evaluation conducted in section 5.3.2 of this chapter generally focuses on the tax dispute resolution procedure initiated through the IRS examination process given that, as outlined in chapter 2, section 2.2.1 of this thesis, this study focuses on tax disputes concerning disagreements over taxpayers' tax liabilities or entitlements rather than disputes over the collection efforts of the revenue authority. Accordingly, an evaluation of the dispute resolution procedure initiated through the IRS collection process is beyond the scope of this study.

⁸⁷ Figure 5.3 represents a simplified version of the US tax disputes resolution procedures. Figure 5.3 was developed by the researcher and was subsequently reviewed by [redacted] (Principal, Co-leader, [redacted], Washington DC) and [redacted] (Principal, [redacted], Washington DC) on 30 November 2016. The researcher is grateful for their feedback.

⁸⁸ For further details, see section 1.4.2 of Appendix 1.4 of this thesis.

⁸⁹ Effective from 18 November 2016, FTMC replaced the Fast Track Mediation (FTM) program formerly offered by the IRS. FTM was available for certain disputes arising from either the IRS examination or collection processes, whereas FTMC now applies only to certain disputes arising from IRS collection. For further details, see Internal Revenue Service Rev. Proc. 2016-57, 2016-49 I.R.B. 786 ["Rev. Proc. 2016-57"] at [2.0]. See also, section 1.4.2 of Appendix 1.4 of this thesis. It should be noted that the tax DSD principles developed in this thesis were developed based, inter alia, on an evaluation of the US tax dispute resolution system that included the former

example, Post Appeals Mediation (PAM) and the Rapid Appeals Process (RAP)).⁹⁰ For disputes reaching the US Tax Court, arbitration or mediation processes are also potentially available.⁹¹ The Taxpayer Advocate Service (TAS) provides an additional avenue for taxpayers to resolve problems with the IRS which they have been unable to resolve themselves.⁹² As indicated in Figure 5.3, the TAS is available alongside the traditional dispute resolution process. A more detailed description of the US tax dispute resolution process and its related features is contained in Appendix 1.4 of this thesis.

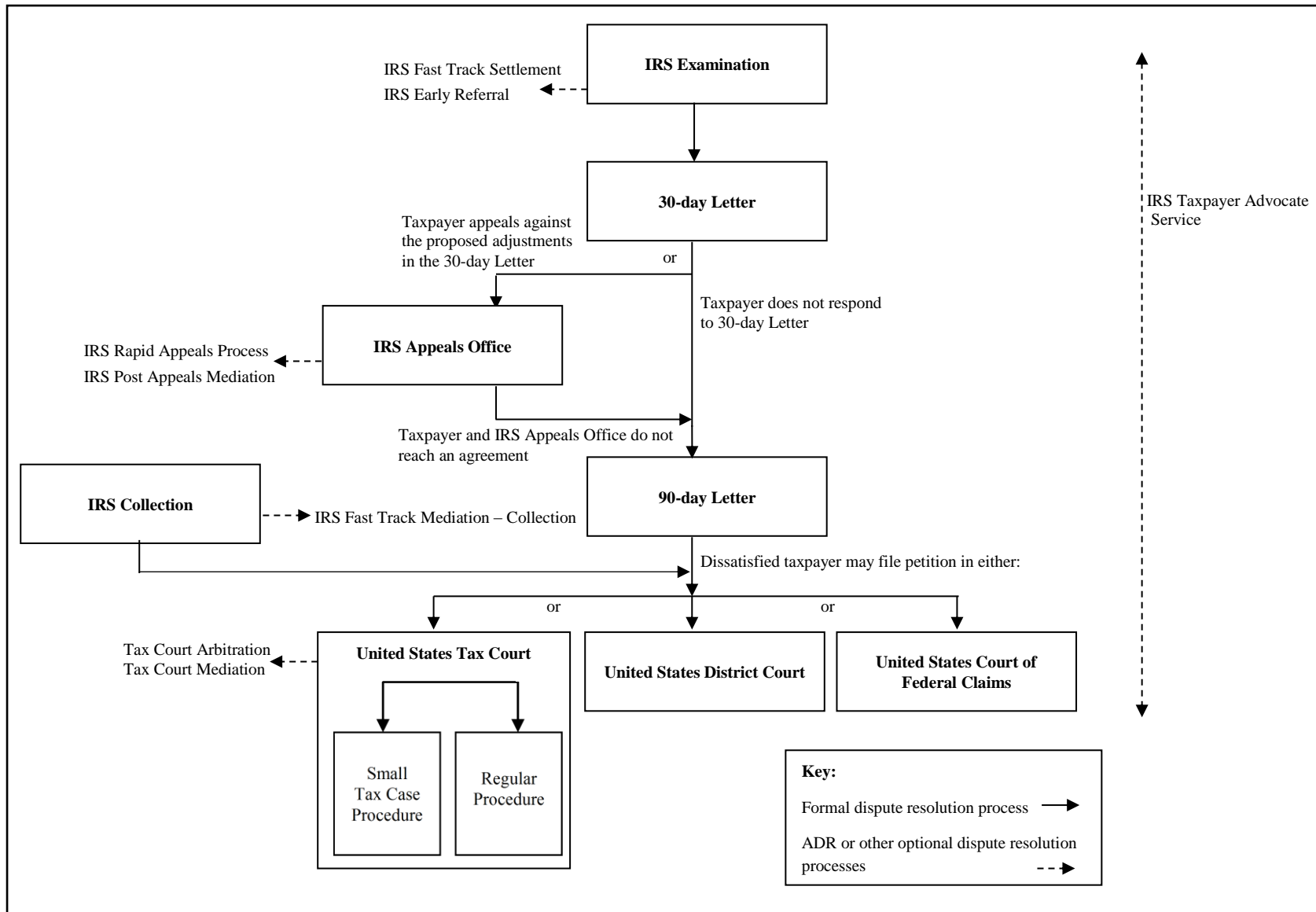
FTM. Following the replacement of FTM by FTMC, the description and DSD evaluation of the US system have been updated to reflect the replacement program. The updated DSD evaluation, however, makes no changes to the tax DSD principles developed.

⁹⁰ The Appeals Arbitration program was also available as an IRS ADR program up until 21 September 2015 when it was eliminated by the IRS. For further details on the IRS Appeals Arbitration program, see section 1.4.2.5 of Appendix 1.4 of this thesis.

⁹¹ For further details, see section 1.4.4 of Appendix 1.4 of this thesis.

⁹² For further details, see section 1.4.5 of Appendix 1.4 of this thesis.

Figure 5.3: The United States' Tax Dispute Resolution Procedures



5.3.2 Evaluation using dispute systems design principles

(1) Stakeholders are included in the design process

The IRS involves taxpayers and other stakeholders in the design process through its pilot programs of various IRS ADR programs. Stakeholders are also involved in the design process when the IRS requests stakeholder submissions on proposed or revised versions of IRS revenue procedures and other forms of IRS guidance. The Taxpayer Advocacy Panel (TAP), a Federal Advisory Committee to the IRS which listens to taxpayers, identifies taxpayers' issues and makes suggestions for improving IRS service and customer satisfaction, may also provide a means for taxpayers to submit suggestions to the IRS in relation to the dispute process and its design.¹ However, the TAP is limited to recommending changes that do not require legislative action.

The IRS Oversight Board engages with a wide variety of stakeholders to understand their views on tax administration and its impact on taxpayers. The Oversight Board is an independent nine-member board created by Congress under the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998),² whose responsibility is to oversee the IRS in its administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws. The Oversight Board holds public meetings and regularly interacts with external groups, including tax professionals, taxpayer advocacy groups, representatives of state tax departments, IRS advisory committees, IRS employees, the National Treasury Employees Union, and other groups that have an interest in tax administration. Thus, these groups can potentially provide input in the design process of the system through these interactions.

(2) The system has multiple options for addressing conflict including interests, rights and power-based processes

The US tax dispute resolution system has multiple options for addressing conflict. The procedures provide for initial negotiations between the taxpayer and the IRS examiner and/or the examiner's supervisor at the conclusion of an IRS examination. If the dispute remains unresolved, the taxpayer may appeal their case to the IRS Appeals Office (the IRS's internal review forum) where a conference may be scheduled so that the taxpayer and the IRS can attempt to negotiate a mutually acceptable settlement. However, unlike at the examination level, IRS Appeals officers are able to consider the hazards of litigation in negotiating a

¹ For further details, see section 1.4.6 of Appendix 1.4 of this thesis.

² Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1101, 112 Stat. 685, 691 (1998). Effective from 1 January 2015, there are six open seats on the Oversight Board. Hence, the Oversight Board currently does not have enough members confirmed by the US Senate to make up a quorum and as a result has suspended operations. The Board will reconvene once it has a quorum: IRS Oversight Board "Home – IRS Oversight Board" <<https://www.treasury.gov/irsob/Pages/default.aspx>> (last accessed 7 November 2016).

settlement. If the dispute cannot be resolved at the IRS Appeals Office level (or the taxpayer chooses to by-pass the IRS Appeals Office), taxpayers may pursue rights-based litigation processes by filing a petition in either the US Tax Court, US District Court or the US Court of Federal Claims.

In addition to the formal dispute process, the IRS Appeals Office offer a number of post-filing ADR programs which may be utilised by different types of taxpayers to manage or resolve disputes during the examination and appeals stages.³ The main post-filing ADR programs available in these stages currently include: FTS; ER; PAM and RAP, and primarily constitute interests-based processes. ADR procedures (mediation and arbitration) are also potentially available before trial for disputes which reach the US Tax Court.

Also, the TAS provides an additional option for taxpayers for resolving problems with the IRS which they have been unable to resolve themselves through normal IRS channels. The TAS may be able to help a taxpayer if: the taxpayer's problem is causing financial difficulties for the taxpayer, their family, or their business; the taxpayer faces (or their business is facing) an immediate threat of adverse action; or the taxpayer has tried repeatedly to contact the IRS but no one has responded, or the IRS has not responded by the date promised.⁴ The TAS is not a substitute for the established administrative or judicial review procedures. Rather it is a possible mechanism that can be used to supplement existing procedures generally if a taxpayer is about to suffer or is suffering a significant hardship.

(3) The system provides for loops backward and forward

The potential availability of ADR processes, such as mediation, before a trial in the US Tax Court can provide a loop-back mechanism in the system from a rights-based option back to interests-based processes. The US system also provides for loops forward in the respect that a taxpayer may choose to by-pass the IRS Appeals process and file a court petition upon the receipt of a 90-day letter. Loops forward in the system are further potentially provided for through various additional IRS dispute resolution programs such as the Accelerated Issues Resolution (AIR) program, Delegation Order 4-24 and Delegation Order 4-25.⁵ Such programs can, for example, give the IRS the authority in certain circumstances, to apply the settlement of an issue with respect to the same taxpayer (or another taxpayer who is directly involved in the transaction or taxable event), to other tax periods under examination where the same issue

³ The IRS also offer a number of pre-filing ADR programs including, but not limited to, the Pre-Filing Agreement (PFA) program, Private Letter Ruling, Industry Issue Resolution (IIR) program, Advance Pricing Agreement (APA) program and the Compliance Assurance Process (CAP). However, as outlined in section 1.4.3.1 of Appendix 1.4 of this thesis, as these pre-filing programs are aimed at resolving disputes prior to the filing of a taxpayer's tax return, they are beyond the scope of this study.

⁴ Internal Revenue Service *Taxpayer Advocate Service: We are Here to Help You* (IRS Pub. No. 1546, June 2016).

⁵ For further details on these programs, see section 1.4.3.2 of Appendix 1.4 of this thesis.

is under examination for the other tax periods.⁶ Taxpayers can thus, loop-forward with respect to resolution of the issue in the other tax periods under examination.

(4) There is notification before and feedback after the resolution process

Notification is built into the dispute resolution process through the IRS's Taxpayer Bill of Rights which provides that taxpayers have "the right to be informed about IRS decisions about their tax accounts and to receive clear explanations of the outcomes."⁷ Taxpayers also have the right to know the maximum amount of time they have to challenge the IRS's position.⁸ In addition, notification may be provided through the IRS's webpage, "Compliance & Enforcement News", which contains a collection of recent news releases, statements and other items related to IRS compliance and enforcement efforts.⁹ This information may highlight potential areas where disputes may arise.

IRS Actions on Decisions (AODs) may also serve as a form of notification. It is IRS policy to announce at an early date whether it will follow the findings in certain cases and an AOD is the document issued by the IRS Office of Chief Counsel making such an announcement.¹⁰ AODs are issued at the discretion of the IRS and only on unappealed issues decided adverse to the government. Counsel attorneys are required to follow the litigating positions announced in AODs in future litigation or dispute resolution.¹¹ While AODs are not affirmative statements of IRS position, they can serve to alert IRS personnel and the public to the current litigating position of the IRS Office of the Chief Counsel with respect to the court decisions addressed by the AODs.

A limited form of systemic feedback occurs through certain Appeals statistics provided on the IRS's website.¹² These statistics are very general in nature, providing data such as the number of cases received, pending and closed in IRS Appeals. Feedback is also provided through the National Taxpayer Advocate's (NTA's) annual reports to congress which, among other things, include a summary of the 20 most serious problems encountered by taxpayers and an

⁶ IRM 1.2.43.22.

⁷ Internal Revenue Service *Your Rights as a Taxpayer* (IRS Pub. No. 1, December 2014) at 1.

⁸ At 1.

⁹ Internal Revenue Service "Compliance & Enforcement News" <<http://www.irs.gov/uac/Compliance-&-Enforcement-News>> (last accessed 7 November 2016).

¹⁰ IRS AODs are published in the Internal Revenue Bulletin (I.R.B.) and are also electronically available, listed by calendar year, in the IRS's Electronic Reading Room on the IRS website at: Internal Revenue Service "Actions on Decisions (AOD)" <<http://apps.irs.gov/app/picklist/list/actionsOnDecisions.html>> (last accessed 7 November 2016).

¹¹ IRM 36.3.1.1.

¹² Internal Revenue Service "Tax Statistics" (19 July 2016) <<https://www.irs.gov/uac/tax-stats>> (last accessed 7 November 2016).

examination of the year's 10 most frequently litigated tax issues.¹³ The dispute system provides for micro-level feedback from taxpayers in the respect that at the conclusion of certain IRS ADR programs IRS Appeals officials are directed to "provide a Customer Satisfaction Survey to the taxpayer along with a return envelope."¹⁴ While the survey is voluntary, its completion is strongly encouraged so that the survey can be used to capture feedback and improve processes. Notwithstanding this feedback procedure, it has been observed that the IRS does not routinely make available statistics regarding its ADR programs.¹⁵

(5) The system has a person or persons who function as internal independent confidential neutral(s)

With respect to an internal independent confidential neutral within the IRS that employees can go to for coaching, referring and problem-solving, in cases worked in IRS Appeals, an Appeals Team Case Leader (ATCL) in each region leads a team of Appeals officers, technicians, and other support personnel. Part of the role of the ATCL is to "provide feedback to team members and his/her immediate manager, and serve as a mentor and coach to team members to enhance their performance and settlement skills."¹⁶ Thus, for relevant IRS Appeals employees, ATCLs may be viewed as the closest equivalent to internal independent confidential neutrals in the system for IRS staff. Although, by virtue of the team approach in IRS Appeals, arguably ATCLs are not strictly independent per se.

As stated earlier, the TAS is an independent organisation within the IRS which provides free help to qualifying taxpayers where they have been unable to resolve a problem with the IRS themselves or believe that an IRS system or procedure is not working as it should. The TAS can give taxpayers advice on how to approach IRS disputes at a very high level including discussing options for resolution, pointing taxpayers to the Taxpayer Bill of Rights provisions, providing fact sheets and FAQ's on their website and referring taxpayers to Low Income Taxpayer Clinics¹⁷ (LITCs).¹⁸ Thus, in the context of the US tax dispute resolution system, the TAS can be viewed as the taxpayers' equivalent of an independent confidential neutral in the system.

¹³ Under I.R.C. § 7803(c)(2)(B), the NTA is required to submit two reports to Congress each year. The first report (Objectives Report) is delivered each June and contains the goals and activities planned by the NTA for the coming year. The second report, the Annual Report to Congress, is delivered at the end of each December. The NTA's reports to Congress are available at: Internal Revenue Service "National Taxpayer Advocate Reports to Congress and Research" <<https://www.irs.gov/Advocate/Reports-to-Congress>> (last accessed 7 November 2016).

¹⁴ IRM 8.26.2.16 and IRM 8.26.7.11.

¹⁵ Ken Jones "Appeals Arbitration: Not a Compelling Litigation Alternative" (2014) 143 Tax Notes 1059 at 1062, 1064.

¹⁶ IRM 8.1.3.5.

¹⁷ For further details see, section 1.4.7 of Appendix 1.4 of this thesis.

¹⁸ Email from [redacted] (Principal, Co-leader, [redacted], Washington DC) to Melinda Jone regarding IRS tax disputes (9 July 2014).

(6) Procedures are ordered from low to high cost

The formal dispute procedures can be viewed as being ordered in a low to high cost sequence in the respect that there is the opportunity for negotiation with the IRS examiner and/or the examiner's supervisor in the first instance, followed by the IRS's administrative Appeals process and then potential proceedings in court. This sequence generally implies an increase in costs at each level. However, there is also the option for taxpayers to utilise the IRS's Appeals ADR programs during the examination and appeals stages of the dispute process. These programs potentially create additional costs at the stage of the dispute procedures at which they are utilised. Although, the expenses associated with each of the IRS Appeals ADR programs vary. For example, in FTS and PAM, the expense of the IRS Appeals mediator is met by the IRS.¹⁹ However, in PAM, if a taxpayer elects to additionally utilise a non-IRS co-mediator, they must cover all the expenses associated with the co-mediator.²⁰ Thus, the additional costs incurred by the taxpayer may vary according to the number and type of additional processes utilised in the dispute procedures.

Furthermore, as noted in the tax dispute resolution processes of the other jurisdictions in this study, the tax dispute resolution process in the US can require substantial upfront costs (including the time spent by the taxpayer in preparing for, and participating in negotiations as well as the cost of professional advisors) from the taxpayer. This suggests that, notwithstanding the apparent low to high cost sequence identified above, the initial upfront costs for the taxpayer may not greatly differ with the stage of the formal dispute process that the dispute is ultimately resolved at.

(7) The system has multiple access points

The dispute process has two structural access points which taxpayers can enter the dispute process at – either at the IRS Appeals Office level or at the level of the US Tax Court. If the taxpayer cannot reach an agreement at the meeting with the IRS examiner and/or their supervisor at the end of an IRS examination, in most instances they will enter the formal dispute process through appealing the decision to the IRS Appeals Office (following the receipt of a 30-day letter). However, in some instances a taxpayer may choose not to respond to the 30-day letter. In which case they will receive a 90-day letter whereby they may instead choose to enter the dispute process at the stage where they file a petition in the US Tax Court.

In addition, if certain criteria are met, there may be multiple access points to the system available for small cases. Generally, to appeal an IRS decision, a taxpayer must send a formal written protest to their local IRS Appeals Office. However, if the total amount of the dispute is

¹⁹ Internal Revenue Service Rev. Proc. 2003-40, 2003-25 I.R.B. 1044 [“Rev. Proc. 2003-40”] at [5.01] and Internal Revenue Service Rev. Proc. 2014-63, 2014-53 I.R.B. 1014 [“Rev. Proc. 2014-63”] at [9.01].

²⁰ Internal Revenue Service “Rev. Proc. 2014-63”, above n 19, at [9.01].

not more than \$US25,000 for each tax period, the taxpayer has the option of making a small case request by sending a letter instead of filing a formal written protest. Also, if a case is petitioned to the US Tax Court and the amount is \$US50,000 or less for any one tax year or period, (albeit that the same petition form is used), the taxpayer has the option to request in their petition form that their case be handled under the small tax case procedures rather than through the regular procedures.

Procedurally, there are relatively limited means by which to deliver notification of entry to the disputes system at each of the structural entry points. That is, written protests or small case requests to the IRS Appeals Office must be sent by mail and petitions to the US Tax Court may either be sent by mail or hand-delivered.

The system offers a choice of access persons for whom certain system users can approach in the first instance in the regard that the IRS offer a number of forms of assistance for “Limited English Proficient” (LEP) persons.²¹ For example, language assistance is available through the Over-the-Phone Interpreter (OPI) service, bilingual assistants and telephone help lines.²² Multiple access persons are also available in the respect that telephone assistance for the deaf and hard of hearing is available for individuals with teletypewriter (TTY) equipment. These individuals may also be able to access the IRS through the federal or state relay services.²³ As noted in the other jurisdictions in this study, while these services offer certain taxpayers with a choice of persons in contacting the IRS generally, they arguably may also act to provide a choice of access persons to approach for certain taxpayers to acquire information about dispute resolution system in the first instance.

Multiple forms of access to the dispute system for certain taxpayers are also provided in the respect that a number of translated forms and publications are made available, including, for example, those relating to taxpayer appeal rights. The IRS also provides a Spanish-language internet website on “the Español Web Site” and websites in four additional languages (Chinese, Korean, Vietnamese and Russian) on the “Multilingual Gateway”.²⁴ In addition, most IRS forms and publications are available in alternative formats such as Braille, large print, HTML, ASCII text, and accessible PDF forms.²⁵ Thus, the above provision of material in alternative formats serves to provide multiple forms of access to the dispute system for taxpayers from different backgrounds or with specific needs.

²¹ IRM 22.31.1.2.1.

²² IRM 22.31.1.1.

²³ Internal Revenue Service “Topic 102 - Tax Assistance for Individuals with Disabilities” (10 August 2016) <<https://www.irs.gov/taxtopics/tc102.html>> (last accessed 7 November 2016).

²⁴ IRM 23.31.1.10.

²⁵ See Internal Revenue Service “Accessible Forms & Publications” (1 November 2016) <<https://www.irs.gov/forms-pubs/accessible-products>> (last accessed 7 November 2016).

(8) The system includes training and education for stakeholders

The IRS's webpage, "Appeals ... Resolving Tax Disputes", contains information on the IRS Appeals Office, what taxpayers can expect from the IRS Appeals Office and on how to prepare an IRS Appeals request.²⁶ The webpage also contains links to online videos and podcasts of the Appeals process, Appeals Online Self-Help Tools, and forms and publications on taxpayers' Appeal rights.²⁷ The IRS further have a webpage, "Appeals Mediation Programs: Alternative Dispute Resolution (ADR)", which provides education and guidance for taxpayers and other stakeholders on the Appeals mediation programs.²⁸ Links are provided to the Appeals mediation programs currently available and to an Appeals Mediation Online Self-Help Tool. In addition, the TAS has a separate dedicated website which provides information for individuals, businesses and tax professionals on its services and programs, and on the Taxpayer Bill of Rights.²⁹

The IRS Internal Revenue Manual (IRM),³⁰ revenue procedures,³¹ notices³² and announcements,³³ which are publically available on the IRS's website, provide official guidance and public pronouncements for IRS employees, taxpayers and other stakeholders on aspects of the US dispute resolution system, including the IRS Appeals Office and the IRS Appeals ADR programs.

²⁶ Internal Revenue Service "Appeals ... Resolving Tax Disputes" (6 October 2016) <<https://www.irs.gov/Individuals/Appeals-Resolving-Tax-Disputes>> (last accessed 7 November 2016).

²⁷ Examples of these publications include: Internal Revenue Service *Your Appeal Rights and How To Prepare a Protest If You Don't Agree* (IRS Pub. No. 5, January 1999); Internal Revenue Service *Appeals: Introduction to Alternative Dispute Resolution* (IRS Pub. No. 4167, July 2012); Internal Revenue Service *Appeals* (IRS Pub. No. 4227, October 2013); and Internal Revenue Service, above n 7. These publications are available at: Internal Revenue Service "Forms and Publications about your Appeal Rights" (7 June 2016) <<http://www.irs.gov/Individuals/Forms-and-Publications-About-Your-Appeal-Rights>> (last accessed 7 November 2016).

²⁸ Internal Revenue Service "Appeals Mediation Programs: Alternative Dispute Resolution (ADR)" (19 April 2016) <<http://www.irs.gov/Individuals/Appeals-Mediation-Programs>> (last accessed 7 November 2016).

²⁹ See Taxpayer Advocate Service "Taxpayer Advocate Service" <<http://www.taxpayeradvocate.irs.gov/>> (last accessed 7 November 2016).

³⁰ The IRM is the primary, official compilation of "instructions to staff" that relate to the administration and operation of the IRS: IRM 1.11.2.2.

³¹ A revenue procedure is an official statement of a procedure that affects the rights or duties of taxpayers or other members of the public under the I.R.C., related statutes, tax treaties and regulations and that should be a matter of public knowledge. Revenue Procedures are also published in the I.R.B.: Internal Revenue Service "Understanding IRS Guidance - A Brief Primer" (6 July 2016) <<http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer>> (last accessed 7 November 2016).

³² A notice is a public pronouncement that may contain guidance that involves substantive interpretations of the I.R.C. or other provisions of the law. For example, notices can be used to relate what regulations will say in situations where the regulations may not be published in the immediate future: Internal Revenue Service, above n 31.

³³ An announcement is a public pronouncement that has only immediate or short-term value. For example, announcements can be used to summarise the law or regulations without making any substantive interpretation or to state what regulations will say when they are certain to be published in the immediate future: Internal Revenue Service, above n 31.

The IRS holds annual IRS Nationwide Tax Forums for tax professionals which are three-day events that provide professionals with current information on federal and state tax issues presented by experts from the IRS and its partner organisations through various training seminars and workshops. The seminars and workshops cover a range of topics including taxpayers' rights, the IRS Appeals process and the IRS's ADR programs. In addition, the IRS Nationwide Tax Forums Online provides self-study seminars for tax professionals based on taped seminars from previous years IRS Nationwide Tax Forums.³⁴ Both the IRS Nationwide Tax Forums and the IRS Nationwide Tax Forums Online may contribute towards continuing professional education (CPE) credits for certain tax professionals. The IRS Video Portal also contains video and audio presentations of various tax topics and archived versions of live panel discussions and webinars for tax professionals.³⁵

LITCs, administered by the TAS, can represent low income individuals in disputes with the IRS.³⁶ In addition to providing taxpayer representation, they can also provide education and outreach to low income taxpayers and taxpayers who speak English as a second language about their taxpayer rights and responsibilities.

IRS Appeals employees are generally trained in-house by IRS Appeals instructors. Special courses may also be provided by contract instructors. IRS Appeals employees acting as mediators in the IRS's ADR programs are trained in mediation. While the actual training is conducted in-house by IRS Appeals, the training regime is designed by an independent (non-governmental) contractor, currently the National Mediators Association.³⁷

(9) Assistance is offered for choosing the best process

There are process advisors for the IRS Appeals process available for taxpayers. This is indicated on the IRS website which outlines that taxpayers can contact the IRS employee that they have been dealing with or call the Taxpayer Service number for assistance in identifying whether their case meets the requirements for entering into the IRS Appeals system.³⁸ The IRS also provides a number of self-help tools to assist taxpayers in choosing the best process.³⁹ The Appeals Online Self-Help Tools can be used by taxpayers to help them focus in on their area of dispute and help them determine if they would benefit from filing an appeal. The Appeals

³⁴ Internal Revenue Service "IRS Nationwide Tax Forums Online" <<http://www.irstaxforumsonline.com/>> (last accessed 7 November 2016).

³⁵ Internal Revenue Service "IRS Video Portal" <<http://www.irsvideos.gov/>> (last accessed 7 November 2016).

³⁶ For further details, see section 1.4.7 of Appendix 1.4 of this thesis.

³⁷ Email from [redacted] (Principal, Co-leader, [redacted], Washington DC) to Melinda Jone regarding IRS ADR staff training (7 June 2014).

³⁸ Internal Revenue Service "Is Appeals the Place for You?" (11 May 2016) <<https://www.irs.gov/individuals/is-appeals-the-place-for-you-1>> (last accessed 7 November 2016).

³⁹ The online self-help tools are available at: Internal Revenue Service "Appeals Online Self-Help Tools" (23 May 2016) <<http://www.irs.gov/Individuals/Appeals-Online-Self-Help-Tools>> (last accessed 7 November 2016).

Mediation Online Self-Help Tool can be used to determine whether there is an appropriate IRS ADR program that may be utilised by taxpayers to help resolve their disputes. There is also a toll-free hot-line to help taxpayers and tax practitioners with questions on the Small Business/Self-Employed (SB/SE) FTS ADR program.

IRS revenue procedures on the IRS ADR programs and the IRM provide guidance for IRS officers and taxpayers on, inter alia, case eligibility and case exclusions from the ADR programs.⁴⁰ The IRS's ADR programs may be requested by either the taxpayer or the IRS after consulting with the other party. IRS Appeals Managers generally act as process advisors to ensure the appropriate use of the ADR programs.⁴¹ In addition, requests for ADR usually require the approval of an IRS Appeals Manager before their acceptance into the requested ADR program.⁴²

(10) Disputants have the right to choose a preferred process

As indicated under DSD Principle 7, taxpayers have the right to choose a preferred process in the respect that they can choose to enter the dispute process at either the IRS Appeals Office level or at the level of the US Tax Court. Also, as noted under DSD Principle 7, for taxpayers with small tax cases there are further opportunities to choose a preferred process in the respect that if certain criteria are met, qualifying taxpayers may choose to file a small case request (thus, following simplified filing requirements) instead of filing a formal protest with the IRS Appeals Office. In addition, at the level of the US Tax Court, taxpayers with qualifying small tax cases may request that their case be handled by the simpler, less formal small case procedures instead of the regular US Tax Court procedures.

Taxpayers also have the right to choose a preferred process in the respect that they are able to select between the formal dispute process and various IRS ADR programs available at the examination and appeals stages of the dispute process. In the FTS program, which may be utilised at the examination (pre-Appeals) stage of the formal dispute process, if an agreement (in whole or in part) is unable to be reached through ADR, the taxpayer retains all of their otherwise applicable appeal rights to request traditional IRS Appeals consideration of unresolved issues.⁴³ Taxpayers with cases that cannot be resolved (in whole or in part) through RAP, which takes place in the Appeals stage, are also entitled to traditional IRS Appeals consideration on all remaining unagreed issues.⁴⁴

⁴⁰ See, for example, Internal Revenue Service "Rev. Proc. 2003-40", above n 19, at [3.02]-[3.03] and Internal Revenue Service "Rev. Proc. 2014-63", above n 19, at [4.03]-[4.04]

⁴¹ Internal Revenue Service "Rev. Proc. 2003-40", above n 19, at [4.01].

⁴² Internal Revenue Service "Rev. Proc. 2003-40", above n 19, at [4.02] and Internal Revenue Service "Rev. Proc. 2014-63", above n 19, at [7.03].

⁴³ Internal Revenue Service "Rev. Proc. 2003-40", above n 19, at [2.02]

⁴⁴ IRM 8.26.11.2.

At the level of the US Tax Court taxpayers can choose a preferred process in the respect that before commencing any formal court proceedings, parties may choose to utilise US Tax Court arbitration or mediation where appropriate. If arbitration is entered into, the arbitrator's decision is binding on the parties. However, if the parties are unable to reach an agreement through mediation, the parties may prepare for trial as normal.

In addition, provided that the taxpayer meets the criteria for assistance, the option of the TAS may technically be used in parallel with the formal tax dispute resolution process. This is because, as stated under DSD Principle 2, the TAS is not intended to be a substitute dispute process for the formal dispute process. Rather, it is intended to supplement the existing process if a taxpayer is about to suffer or is suffering significant hardship and have not been able to solve their problems on their own.

(11) The system is fair and perceived as fair

The mission of the IRS Appeals Office is to “resolve tax controversies, without litigation on a basis which is fair and impartial to both the government and the taxpayer.”⁴⁵ Independence from other IRS offices is critical for the IRS Appeals Office to accomplish this mission. Section 1001(a) of the RRA 1998 directed the IRS Commissioner to develop and implement a plan to reorganise the IRS and, inter alia:

[E]nsure an independent Appeals function within the Internal Revenue Service, including the prohibition ... of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.

An ex parte communication is a communication that takes place between any IRS Appeals employee and employees of other IRS functions, without the taxpayer or representative being given an opportunity to participate in the communication.⁴⁶ Notwithstanding Appeals' constitution as a separate function within the IRS and the issuance of IRS administrative guidance prohibiting certain communications between IRS Appeals officers and officers from originating functions,⁴⁷ “criticism has persisted that Appeals personnel are improperly influenced by other staff.”⁴⁸ Furthermore, one of the main drawbacks for taxpayers of IRS Appeals as an avenue for issue resolution “is some taxpayers' belief that the [Appeals] office has too much of an exam mentality to offer an impartial review.”⁴⁹

⁴⁵ IRM 1.1.7.1.

⁴⁶ Internal Revenue Service Rev. Proc. 2012-18, 2012-10 I.R.B. 455 [“Rev. Proc. 2012-18”] at [2.01].

⁴⁷ See Internal Revenue Service “Rev. Proc. 2012-18”, above n 46.

⁴⁸ Jeremiah Coder “Overcoming Appeals' Bad Rap” (2011) 132 Tax Notes 1196 at 1197.

⁴⁹ At 1201. See also, American Bar Association Section of Taxation *Survey Report on the Independence of IRS Appeals* (11 August 2007) at 31-36.

Notwithstanding the prohibition against certain ex parte communications, there are no legislative remedies or sanctions for breaches of the rule. Although, where a breach has occurred, the IRS does require the Appeals Office to “cure” the breach by promptly notifying the taxpayer of the communication, sharing the contents of the communication and affording the taxpayer an opportunity to respond.⁵⁰ In applicable instances, the case may be assigned to another IRS Appeals officer.⁵¹ However, the specific administrative remedy that will be made available “is within the sole discretion of Appeals and will be based on the facts and circumstances of the particular case.”⁵² Thus, the absence of enforceable remedies for ex parte breaches within either administrative procedures or legislation, “presents another challenge to the perception of Appeals’ independence.”⁵³

Nevertheless, personal correspondence by the researcher with a number of US tax practitioners indicates the existence of generally positive perceptions of the IRS Appeals Office in effectively resolving disputes.⁵⁴ Historically, IRS Appeals have settled 90 to 95 per cent of all cases coming to the Appeals Office in all of their dispute resolution processes.⁵⁵ Furthermore, evidence given by a former IRS First Commissioner purports that:⁵⁶

Appeals officials take a great deal of pride regarding their independence. Rarely have there been complaints about their independence. In general, Appeals officers are recruited from experienced IRS agents, and they have an intense training program in ADR tools and independence.

Yet, in February 2012, IRS Appeals initiated the Appeals Judicial Approach and Culture (AJAC) project in response to concerns by internal and external stakeholders, including IRS Appeals employees, that its determinations did not appear to be independent and impartial. The project was aimed at “reinforcing Appeals’ quasi-judicial approach to the way it handles cases,

⁵⁰ I.R.M. 8.1.10.5.6.

⁵¹ I.R.M. 8.1.10.5.7.

⁵² I.R.M. 8.1.10.5.8.

⁵³ Gerald A Kafka, Rita A Cavanagh and Sean M Akins “Do IRS Appeals’ Office Ex Parte Prohibitions Need Strengthening?” (2009) 122 Tax Notes 1591 at 1598.

⁵⁴ Email from [redacted] (Tax Partner, [redacted], Palo Alto, California) to Melinda Jone regarding the IRS Appeals Office and IRS Appeals ADR programs (9 May 2015); Telephone correspondence from [redacted] (Principal, Co-leader, [redacted], Washington DC) and [redacted] (Principal, [redacted], Washington DC) to Melinda Jone regarding the IRS Appeals Office and IRS Appeals ADR programs (7 May 2015). This appears to be consistent with an audit of the independence of the IRS Appeals Office by the Treasury Inspector General for Tax Administration (TIGTA) in 2005 which found that members of tax professional organisations believed the independence of the IRS Appeals Office was “generally very high.” See Treasury Inspector General for Tax Administration *The Overall Independence of the Office of Appeals to Be Sufficient* (September 2005) at 4.

⁵⁵ Telephone correspondence from [redacted] (Principal, Co-leader, [redacted], Washington DC) and [redacted] (Principal, [redacted], Washington DC), above n 54.

⁵⁶ Email from [redacted] (Tax Partner, [redacted], Palo Alto, California), above n 54. See also, similar comments made by various practitioners in Coder, above n 48, at 1197.

with the goal of enhancing internal and external customer perceptions of a fair, impartial and independent Office of Appeals.”⁵⁷ As part of the AJAC project, IRS procedures have been modified to emphasise the following features of the Appeals system:

- IRS Appeals will not raise new issues nor reopen any issues on which the taxpayer and IRS are in agreement.⁵⁸
- The IRS Appeals process is not a continuation or an extension of the examination process.⁵⁹
- IRS Appeals should receive cases from the examination function that are fully developed and documented, such that IRS Appeals will not refer the case back to the examination function for further development, but will attempt to settle the case as submitted taking into account factual hazards.⁶⁰
- Where the taxpayer raises new issues, information, or evidence, IRS Appeals will forward these to the examination function for their consideration.⁶¹

In general, the above policies are intended to clarify and separate the negotiation and decision-making role of IRS Appeals from the factual investigations and case development allocated to the examination function.⁶² However, concerns have been raised that, in practice AJAC is being used “to limit taxpayer’s access to Appeals, causing cases to be bounced back and forth between Appeals and Compliance, and resulting in curtailed review by Hearing Officers.”⁶³ This outcome of AJAC implementation “is diminishing the timeliness, quality and fairness of case reviews.”⁶⁴

A number of issues have also been raised in the literature with respect to perceptions of fairness of the IRS Appeals ADR programs. One of the main concerns is in relation to the impartiality of the mediator. Given that the likely mediator of the IRS’s tax mediation regimes is an employee of the IRS Appeals Office, questions have been raised regarding the mediator’s neutrality and potential bias in favour of the IRS.⁶⁵ This is of importance given that “perceived

⁵⁷ Internal Revenue Service Memorandum for Appeals Employees AP-08-0714-0004 (2 July 2014).

⁵⁸ IRM 8.6.1.6.2.

⁵⁹ IRM 8.6.1.6.2.

⁶⁰ IRM 8.2.1.4.3.

⁶¹ IRM 8.2.1.5.2.

⁶² Nina E Olson *National Taxpayer Advocate 2015 Annual Report to Congress* (Internal Revenue Service, December 2015) at 82.

⁶³ At 89.

⁶⁴ Nina E Olson *National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress – Volume 2* (Internal Revenue Service, August 2016) at 48.

⁶⁵ Leonora Meyercord “Avoiding state bankruptcy: Mediation as an alternative to resolving state tax disputes” (2010) 29 Rev Litig 925 at 938.

bias creates mistrust in the process.”⁶⁶ In addition, it is possible for taxpayers in the PAM program, with the approval of IRS Appeals, to engage a third party co-mediator who is not employed by the IRS. However, as the taxpayer is responsible for paying for the co-mediator, this makes it “an unprofitable and highly discouraging option” for most taxpayers.⁶⁷

Another concern with IRS ADR, particularly in respect of the FTS program, is that of confidentiality and the lack of restriction on ex parte communications.⁶⁸ As a requirement for participation in FTS, the parties must agree to a waiver of ex parte communications so that IRS Appeals officials can act as mediators while the case is still in the examination process. Taxpayers fear that IRS Appeals officials will abuse the waiver of ex parte communications in FTS either through communications with other IRS employees at the examination level, or later if that IRS Appeals official is involved in the case during the IRS Appeals process.⁶⁹ Thus, ex parte communications run the risk that:⁷⁰

... in addition to the necessary administrative contacts, appeals is overstepping the intent of the waivers by discussing substantive issues with IRS employees in a manner that could bias, or appear to bias, the appeals employees toward the positions of the IRS compliance functions.

Hence, various commentators have argued that the above concerns, as well as other issues, have in part contributed towards a noted underutilisation of the IRS’s Appeals ADR programs.⁷¹

(12) The system is supported by top managers

There appears to be limited visible evidence of the championship of the IRS Appeals Office and/or of the IRS Appeals ADR programs by the IRS Commissioner in the form of published speeches or other media releases.⁷² However, there appears to be some degree of evidence of the support and championship of the IRS Appeals process and of the IRS Appeals ADR programs in presentations given by the current Chief of IRS Appeals (who reports directly to

⁶⁶ At 938.

⁶⁷ Stephen Folan “Even ADR Must Pay Its Dues: An Analysis of the Internal Revenue Service’s ADR Programs and Where They Still Need to Grow” (2013) 13 Pepp Disp Resol LJ 281 at 288.

⁶⁸ David Parsly “The Internal Revenue Service and Alternative Dispute Resolution: Moving from Infancy to Legitimacy” (2007) 8 Cardozo J Conflict Resol 677 at 702.

⁶⁹ Folan, above n 67, at 288; Parsly, above n 68, at 702.

⁷⁰ Parsly, above n 68, at 703.

⁷¹ Folan, above n 67; Parsly, above n 68; Gregory P Mathews “Using Negotiation, Mediation and Arbitration to Resolve IRS-Taxpayer Disputes” (2004) 19 Ohio St J on Disp Resol 709.

⁷² See the published speeches and statements made by the IRS Commissioner, available at: Internal Revenue Service “Commissioner’s Comments, Statements and Remarks” <<http://www.irs.gov/uac/Commissioner's-Comments,-Statements-and-Remarks>> (last accessed 7 November 2016).

the IRS Commissioner).⁷³ In addition, personal correspondence by the researcher with a US tax practitioner suggests a belief that IRS officials do regularly speak at various conferences on the IRS Appeals process and ADR.⁷⁴

(13) The system is aligned with the mission, vision and values of the organisation

The disputes system is structurally integrated into the organisation through the IRS Appeals Office. Organisationally located in the Office of the Commissioner, the IRS Appeals Office operates independently from IRS functions such as the examination division, which performs audits to determine the correct tax liability, and the Office of Chief Counsel, which litigates US Tax Court cases for the IRS. As stated under DSD Principle 11 in this section, since its establishment in 1927, the mission of the IRS Appeals Office has been to:⁷⁵

[R]esolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.

The overall Mission, Vision and Values of the IRS are as outlined in Figure 5.4:

⁷³ See, for example, various presentations by Kirsten Wielobob, the Chief of IRS Appeals as at 30 November 2016: Kirsten Wielobob “IRS Appeals and Litigation Strategies and Process Updates” (paper presented to the Tax Executives Institute 64th Midyear Conference, Washington DC, 23-26 March 2014); Kirsten Wielobob “Resolving Cases in Today’s Appeals” (paper presented to the Federal Bar Association Tax Law Conference 2015, Washington DC, 6 March 2015); Kirsten Wielobob “What’s New in IRS Exam and Appeals” (panelist in the ABA Section of Taxation 2015 May Meeting, Washington DC, 7-9 May 2015); Kirsten Wielobob “Recent Developments at Appeals” (paper presented to the Federal Bar Association Tax Law Conference 2016, Washington DC, 4 March 2016).

⁷⁴ Email from [redacted] (Managing Director, [redacted], Houston) to Melinda Jone regarding tax dispute resolution in the IRS (5 August 2014).

⁷⁵ IRM 1.1.7.1.

Figure 5.4: The Internal Revenue Service’s Mission, Vision and Values⁷⁶

Mission:

Provide America’s taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Vision:

We will uphold the integrity of our nation’s tax system and preserve the public trust through our talented workforce, innovative technology and collaborative partnerships.

Values:

- Honesty and Integrity
- Respect
- Continuous Improvement
- Inclusion
- Openness and Collaboration
- Personal Accountability

It follows that the mission of the IRS Appeals Office of enhancing voluntary compliance and overall confidence in the fairness of the tax system through providing an efficient and independent administrative appeals system for taxpayers, generally appears to align with the overall mission of the IRS to “[p]rovide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all”⁷⁷ (insofar as the dispute resolution system constitutes one of the service offerings provided by the IRS in achieving its mission). The dispute process provided by the IRS Appeals Office also serves to fulfil the right in the IRS’s Taxpayer Bill of Rights which states that “taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions.”⁷⁸

In providing the central direction for the attainment of the overall mission of the IRS, the IRS Strategic Plan (which sets out the IRS’s primary goals and objectives for the next four years) outlines that one of the current strategic goals of the IRS is “to deliver high quality and timely service to reduce taxpayer burden and encourage voluntary compliance.”⁷⁹ Notwithstanding this goal, the IRS Appeals Office presently does not appear to feature in the IRS’s planned initiatives for achieving the strategic goals outlined in the current 2014-2017 Strategic Plan.

⁷⁶ Internal Revenue Service *Strategic Plan FY 2014-2017* (IRS Pub. No. 3744, June 2014) at 14-15.

⁷⁷ At 14.

⁷⁸ Internal Revenue Service, above n 7, at 1.

⁷⁹ Internal Revenue Service, above n 76, at 16.

In addition, there is an apparent lack of integration of the tax dispute resolution system in the “IRS Future State” initiative, a comprehensive plan developed by the IRS since 2014 which envisions how it will operate in five years and beyond.⁸⁰ The plan includes a stated goal of creating online taxpayer accounts through which taxpayers will be able to obtain information and interact with the IRS.⁸¹ Further implicit in the plan is an intention on the part of the IRS to substantially reduce telephone and face-to-face interaction with taxpayers.⁸² A reduced ability for taxpayers to personally contact the IRS may have an adverse impact on the ability for certain taxpayers to resolve the issues underlying these contacts.⁸³ As a consequence, confidence in the fairness of the tax system may erode and may over time lead to a lower rate of voluntary compliance.⁸⁴

With regard to the integration of ADR within the system, in order to achieve its mission, the IRS Appeals Office provides taxpayers with “a variety of alternative dispute resolution forums to resolve taxpayer disputes without litigation.”⁸⁵ However, IRS efforts to incorporate ADR within the disputes system have primarily been driven by the RRA 1998 (enacting I.R.C. § 7123), which directed the IRS to implement procedures to allow a broader use of early appeals programs and to establish procedures that allow for ADR processes such as mediation and arbitration. Moreover, whether ADR has in fact been sufficiently integrated into the disputes system in practice, can arguably be questioned given the observation that the IRS has been reluctant to fully embrace ADR due to, *inter alia*, the “well-established” negotiation procedures of the IRS Appeals Office.⁸⁶ The extant literature suggests that the IRS have designed its ADR programs “with a purposely narrow scope and application so that they can supplement, rather than replace, the existing negotiation process.”⁸⁷ Furthermore, the limited available statistics on the IRS’s ADR programs suggest that the ADR programs “are not being fully used and must be improved to help Appeals achieve its mission.”⁸⁸

⁸⁰ See Internal Revenue Service “IRS Future State” (4 March 2016) <<https://www.irs.gov/uac/newsroom/irs-future-state>> (last accessed 7 November 2016).

⁸¹ Internal Revenue Service, above n 80.

⁸² Olson, above n 62, at 3.

⁸³ At 4. For further information, see Taxpayer Advocate Service “National Taxpayer Advocate Public Forums” (22 June 2016) <[https://taxpayeradvocate.irs.gov/news/national-taxpayer-advocate-public-forums?category=Tax News&taxissue=2556](https://taxpayeradvocate.irs.gov/news/national-taxpayer-advocate-public-forums?category=Tax%20News&taxissue=2556)> (last accessed 7 November 2016), which provides full transcripts of a series of public forums held by the NTA in 2016 on the IRS Future State Plan and taxpayers’ needs and preferences when dealing with the IRS.

⁸⁴ Olson, above n 62, at 4.

⁸⁵ IRM 1.1.7.1.

⁸⁶ Folan, above n 67, at 299.

⁸⁷ At 289.

⁸⁸ Jones, above n 15, at 1064.

(14) There is evaluation of the system

Ongoing evaluation of the system occurs through the IRS Appeals Customer Satisfaction Survey which is conducted for the IRS by an independent vendor. The objective of the survey is to identify what IRS Appeals staff and managers can do to improve customer service and to track customer satisfaction with the Appeals process over time. While these surveys have been conducted annually since 1997, the results of the surveys are apparently not routinely made publically available.⁸⁹

As noted under DSD Principle 4 in this section, there is also provision for the evaluation of certain IRS Appeals ADR programs in the respect that taxpayers are requested to participate in a Customer Satisfaction Survey at the conclusion of the ADR program so that information can be gathered for evaluating and improving the relevant ADR process. However, similar to the IRS Appeals Customer Satisfaction Survey, the IRS Appeals Office apparently do not routinely publish the results of these surveys.⁹⁰ In addition, in 2012, the IRS Appeals Office engaged the Harvard Negotiation and Mediation Clinical Program (HNMCP) to evaluate the IRS's existing ADR tools. This was a one-off evaluation conducted on the IRS Appeals Office's ADR programs to identify potential opportunities for improvement.⁹¹

The TAP may also provide a means through which evaluation of the dispute resolution system can occur in the respect that they conduct outreach to solicit suggestions or ideas from citizens, and serve on project committees working with IRS program owners on topics important to taxpayers and the IRS. The TAP identifies tax issues of importance to taxpayers and provides taxpayers' perspectives to the IRS on key programs, products, and services (which may include the dispute resolution system). It also serves as a focus group that makes recommendations to the IRS and the NTA.

The NTA's annual reports to Congress may provide a form of evaluation of the system to the extent that problems relating to the IRS Appeals Office and its processes are identified and consequent legislative and/or administrative changes may be recommended. The IRS Oversight Board may additionally provide an evaluation of aspects of the dispute resolution system through its annual reports to Congress and other special reports issued.

Federal oversight organisations such as the US Government Accountability Office (US GAO) and the TIGTA have also provided reports on the IRS Appeals Office and its processes. The

⁸⁹ Email from [redacted] (Economist, [redacted], Internal Revenue Service) to Melinda Jone regarding the Appeals Customer Satisfaction Survey results (19 June 2014).

⁹⁰ Email from [redacted] (Practice Administrator, [redacted], New York) to Melinda Jone regarding IRS Appeals statistics (30 July 2014).

⁹¹ However, the majority of the HNMCP report (including the findings and recommendations) is exempt from disclosure as privileged information: Email from [redacted] (Appeals Senior Program Analyst, [redacted], Internal Revenue Service) to Melinda Jone regarding the HNMCP survey of IRS ADR programs (7 February 2015).

US GAO is an independent, nonpartisan agency that works for Congress. One of the ways in which the US GAO supports congressional oversight is by reporting on how well government programs and policies are meeting their objectives.⁹² The TIGTA was established by Congress under the RRA 1998⁹³ and provides audit and investigative services that promote economy, efficiency and integrity in the administration of the internal revenue laws. The TIGTA's audit reports review and recommend improvements on all aspects of the IRS's administration of the tax system including, for example, the IRS Appeals Office.⁹⁴

5.4 Summary of the Author's Evaluations of the United Kingdom and the United States

This chapter has outlined, and then evaluated using DSD principles, the tax dispute resolution procedures of the UK and the US. From a DSD perspective, the tax dispute resolution systems in the two jurisdictions are similar in many respects. The systems in both jurisdictions meet many of the DSD principles of best practice including: involving stakeholders in the design process; providing multiple options for addressing conflict (including direct negotiation, internal review, litigation and ADR processes); the presence of loop-back and loop-forward mechanisms; notification and feedback on disputes is provided to taxpayers; an internal unit or person is available to mentor and provide advice on dispute resolution; the procedures in the system are ordered in a low to high cost sequence (notwithstanding high upfront costs to taxpayers in both jurisdictions); training and education for stakeholders of the system; providing assistance for choosing a preferred process and mechanisms for evaluating the system.

Both systems generally provide multiple structural access points. Taxpayers are thus, provided with the ability to choose between entering the system at the level of internal review or at the level of external appeal. Both systems also offer taxpayers the ability to choose a preferred process in the respect that ADR options are able to be utilised throughout the dispute process (including at the audit and litigation stages). However, the US system offers a wider range of ADR (and other dispute resolution) programs. This partly reflects the need for the IRS to cater for a larger taxpayer base as well as the relative complexity of the US tax laws and tax system. The US system offers a further dispute resolution option with the provision of the TAS, which is available generally if a taxpayer is about to suffer or is suffering significant hardship and have not been able to solve their problems on their own. As the TAS may technically be used in parallel with the formal dispute process, this option also constitutes another way in the US system in which taxpayers are provided with the ability to choose a preferred process. A further

⁹² See, for example, United States General Accounting Office *IRS Initiatives to Resolve Disputes Over Tax Liabilities* (Washington DC, May 1997).

⁹³ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1103(a), 112 Stat. 685, 707 (1998).

⁹⁴ See, for example, Treasury Inspector General for Tax Administration, above n 54.

opportunity for certain taxpayers to choose a preferred process in the US system is provided where small tax cases meeting certain criteria are able to choose between utilising the small case procedures and the regular procedures for filing a protest with the IRS Appeals Office or a petition to the US Tax Court. The provision of these options also serves to provide multiple access points for qualifying taxpayers. In the UK there is a limited form of provision for small tax cases in the respect that on applications made to the tribunal, tax cases are categorised based on their complexity as either default paper cases, basic cases, standard cases or complex cases. However, taxpayers (or HMRC) are unable to select the categorisation as it is made by the tribunal.

In both jurisdictions there have been some indications of negative perceptions of fairness of the tax dispute resolution systems evident. Although, in recent times the revenue authorities in both jurisdictions have taken various measures in attempt to improve taxpayers' perceptions of fairness. Nevertheless, there appears to be limited visible evidence of the support and championship of the dispute resolution systems overall, by certain members of top management of the revenue authorities in both jurisdictions (that is, the IRS Commissioner and HMRC's Executive Chair and Chief Executive). With respect to the support and championship of ADR, in the US there is some evidence of the promotion of the IRS Appeals ADR programs in presentations given by IRS Appeals officials. However, in the UK there appears to be limited evidence of the promotion of HMRC's ADR programs since their incorporation into "business as usual" by HMRC. Although, arguably this may partly reflect the comparatively shorter timeframe since their implementation.

In both systems, the revenue authority's stated approach toward dispute resolution (through HMRC's LSS in the UK and the IRS Appeals mission statement in the US) appear to generally align with the organisational mission (or strategic objectives). Nevertheless, in both jurisdictions there is an apparent current lack of integration of the tax dispute resolution systems within HMRC's modernisation programme and the IRS's Future State initiative, respectively. In addition, in both jurisdictions there is an apparent reluctance to fully integrate the use of ADR into the dispute resolution system. In the UK this is evident in the fact that the LSS envisages that ADR is to be used sparingly within HMRC's normal way of working. While in the US, the IRS has been reluctant to fully embrace ADR due to the relative success of the well-established procedures of the IRS Appeals Office.

Feedback on disputes in both systems occurs through the publication of general statistics on disputes and in the annual reports of the revenue authority. In addition, both jurisdictions collect feedback from disputants on the processes in the dispute procedures which they have been involved in. Although, despite the presence of mechanisms for the collection of feedback, a notable deficiency in the US system appears to be the limited publication of the findings from the feedback collected.

In summary, notwithstanding that the US system offers a more comprehensive range of dispute resolution options, both the tax dispute resolution systems in the UK and the US broadly meet similar DSD principles of best practice. The design strengths in both systems include meeting certain DSD aspects that are largely related to the structure of the system, such as multiple structural access points to the system, providing taxpayers with multiple options to choose from and, loop-back and loop-forward mechanisms. In addition, the two systems are similar in respect of design deficiencies. The deficiencies in both jurisdictions generally relate to the support and championship of the system. These include aspects such as the visible evidence of support for the system by certain members of senior management, the promotion of the use of ADR and the perceived fairness of the system. Accordingly, while both jurisdictions meet a number of the DSD principles relating to the structure of the dispute resolution system, improvements could be made with respect to the support and championship of both systems.

Having outlined and evaluated the tax dispute resolution systems of the UK and the US in this chapter, and NZ and Australia in chapter 4, the next chapter (chapter 6) will compare the similarities and differences in the DSD evaluations of the four jurisdictions. Consequently, a set of best practice tax DSD principles to be utilised by tax authorities in improving their existing or developing new tax dispute resolution systems will be derived.

Chapter 6: Research Results: Case Study Comparisons and the Derivation of the Tax Dispute Systems Design Principles

6.1 Introduction

The purpose of this chapter is to compare the dispute systems design (DSD) evaluations of the four jurisdictions' tax dispute resolution procedures conducted in chapters 4 and 5, and based on the similarities and differences identified, derive a set of best practice tax DSD principles. Accordingly, section 6.2 of this chapter provides a comparison of the DSD evaluations of the tax dispute resolution systems of the four jurisdictions, including an outline in tabular form of the similarities and differences in the DSD evaluations. Section 6.3 then derives the tax DSD principles and discusses the reasons behind the modifications made to the set of general DSD principles in developing the tax DSD principles. Section 6.4 provides a chapter summary.

6.2 Comparison of the Dispute Systems Design Evaluations of the Four Jurisdictions

The following subsections summarise the DSD evaluations conducted on the tax dispute resolution systems in New Zealand (NZ) (section 6.2.1), Australia (section 6.2.2), the United Kingdom (UK) (section 6.2.3) and the United States (US) (section 6.2.4). A comparison of the four jurisdictions' DSD evaluations is then provided in section 6.2.5.

6.2.1 New Zealand

The NZ tax dispute resolution system¹ does not meet a number of the DSD principles of best practice. This is in part due to the fact that the procedures require the prescribed exchange of documents at certain points of the procedure before a dispute reaches internal review by Inland Revenue's Disputes Review Unit (DRU (NZ)). While the system has interests and rights-based processes for addressing conflict, the inclusion of the prescribed exchange of documents at certain stages means that the procedures are not ordered in a low to high cost sequence. There is only one structural entry point to the procedures and in comparison to the three other jurisdictions in this study, excepting the opt-out, generally there is limited ability for taxpayers to choose a preferred path in the procedures. Alternative dispute resolution (ADR) is only available as an option during the conference phase of the dispute procedures and potentially in the Taxation Review Authority (TRA) and the High Court during the litigation stage. Evidence of negative stakeholder perceptions of fairness of the system exist, inter alia, due to concerns with respect to the time and cost of pursuing the procedures. Furthermore, the purpose of the dispute procedures under s 89A of the Tax Administration Act 1994 (TAA 1994), prima facie, does not appear to align clearly with the overall mission, vision and values of Inland Revenue. Although, it has been recognised that the way tax disputes are resolved is critical to taxpayer

¹ For further details on the NZ tax dispute resolution system and its related features, see Appendix 1.1 of this thesis.

perceptions of fairness and has wider impacts for the NZ tax administration. The disputes system also does not appear to be visibly championed by the Commissioner of Inland Revenue (the NZ Commissioner) in the form of speeches and other presentations.

6.2.2 Australia

The Australian tax dispute resolution system² meets many of the DSD best practice principles. The Australian Taxation Office (ATO) in recent years has been pro-active in introducing a number of ADR and early resolution initiatives including in-house facilitation and independent review processes. Furthermore, the system provides the ability for parties to utilise ADR processes, if appropriate, generally at any stage of the formal dispute process (including at the audit and litigation stages). A primary strength of the system is that it is visibly supported by ATO senior management, including the Australian Commissioner of Taxation (the Australian Commissioner), Second Commissioner Law Design and Practice and the Deputy Commissioner, RDR. In addition, the ATO's dispute resolution approach, as outlined in its Disputes Policy and Dispute Management Plan, is aligned with the overall mission, vision and values of the organisation. There are also various mechanisms employed both internally and externally to evaluate the system and foster continuous improvement. Nevertheless, there are some deficiencies in the system. Like NZ, the system has only one structural entry point. Accordingly, there is no option for taxpayers to choose a preferred process (that is, internal review or external appeal) at the outset of a tax dispute. Consequently, there is no loop-forward mechanism which allows parties to by-pass the internal review process and proceed directly to a tribunal or court.

6.2.3 The United Kingdom

The tax dispute resolution system³ in the UK meets most of the DSD principles of best practice. A notable feature of the system is that it is multi-option in nature. That is, there is the ability for taxpayers to choose to have an internal review, appeal to an independent tax tribunal or do both. In addition, alongside taxpayers' existing review and appeal rights, optional ADR programs for large or complex cases and Small and Medium-Sized Enterprises and individuals (SMEi's) are available at any stage of the dispute process (including during a HM Revenue and Customs (HMRC) compliance check and once an appeal has been lodged with the HM Courts and Tribunals Service (the Tribunals Service)). Notwithstanding that the above aspects provide multiple structural entry points to the system (for indirect tax disputes), the ability to loop-forward in the dispute procedures and provide taxpayers with the right to choose a preferred

² For further details on the Australian tax dispute resolution system and its related features, see Appendix 1.2 of this thesis.

³ For further details on the UK tax dispute resolution system and its related features, see Appendix 1.3 of this thesis.

process, there appears to have been limited visible championship by senior revenue authority members of HMRC's ADR programs since their introduction in 2013. Moreover, the integration of ADR within the system is questionable given that HMRC's approach towards dispute resolution outlined in its Litigation and Settlement Strategy (LSS) envisages that disputes will be resolved either through agreement with the taxpayer or litigation (and ADR is to be used sparingly within this approach). This approach towards ADR as well as its apparent absence from HMRC's current Single Departmental Plan and modernisation programme, arguably appears to contrast with the effort put in by HMRC in the pilot testing of the ADR programs, and their subsequent evaluations, prior to the programs being formally introduced.

6.2.4 The United States

The US tax dispute resolution system⁴ also meets most of the DSD principles of best practice. Similar to the system in the UK, the US system provides multiple structural entry points, the ability to loop forward in the dispute process and a number of ways for taxpayers to choose a preferred path. Distinct from the other three jurisdictions in this study, alongside the formal dispute process, the Taxpayer Advocate Service (TAS), an independent organisation within the Internal Revenue Service (IRS), provides an additional option for taxpayers to resolve problems with the IRS which they have been unable to resolve themselves through normal IRS channels. The US tax dispute resolution system also offers qualifying taxpayers the option to choose between utilising small tax case and regular procedures at both the IRS Appeals level and in the US Tax Court. The system offers a number of optional ADR programs for certain types of taxpayers during the examination and appeals stages of the dispute process. However, the literature indicates that there are a number of concerns in relation to the IRS's ADR programs. These include that there are some perceptions of bias and lack of impartiality in relation to the use of IRS employees as mediators, and issues with respect to confidentiality and the lack of restriction on ex parte communications in certain ADR programs.

Anecdotal evidence indicates that the IRS's ADR programs are underutilised. While the IRS does gather feedback on the Appeals process and ADR through the IRS Appeals Customer Satisfaction Survey and by inviting the participants in its ADR programs to complete a Customer Satisfaction Survey following the conclusion of the ADR program, the results of these surveys are apparently not routinely made publically available. The lack of transparency regarding the use (or non-use) of the IRS ADR programs, in part, arguably reinforces the noted reluctance of the IRS to fully embrace ADR due to the well-established negotiation procedures of the IRS Appeals Office. Furthermore, ideally it would be expected that the feedback from these surveys could be used in a more pro-active manner by the IRS Appeals Office in evaluating its ADR programs and considering possible ways to improve them.

⁴ For further details on the US tax dispute resolution system and its related features, see Appendix 1.4 of this thesis.

6.2.5 The four jurisdictions compared

Upon comparing the four jurisdictions, it is apparent that the tax dispute resolution systems of the UK and the US both lead the way in terms of meeting most of the DSD principles of best practice identified in the DSD literature. Key features of the two systems include that they generally have multiple structural access points and accordingly offer taxpayers the option to choose a preferred process from the outset. They also provide the ability for taxpayers to loop-forward to litigation and therefore by-pass the revenue authority's internal review process. Both systems offer taxpayers the opportunity to utilise ADR programs throughout the course of the dispute procedures, including during the audit and litigation stages. Although, the US system features a broader range of ADR programs, in part to cater for its larger base of taxpayers. Notwithstanding the aforementioned features, it appears that the revenue authorities in the UK and the US both illustrate some reluctance in promoting and encouraging the use of their ADR programs in resolving tax disputes.

On the other hand, in Australia there is a high level of support by various senior members of the ATO for the use of ADR, where appropriate, generally at any stage of the Australian tax dispute resolution procedures. The system also features a number of initiatives promoting early engagement and resolution of disputes such as the independent review process and the early assessment and resolution process (EAR) in the Administrative Appeals Tribunal (AAT). While the Australian system meets many of the other DSD principles of best practice such as: involving stakeholders in the design process; providing multiple options for addressing conflict; the presence of loop-back procedures; notification before and feedback after the resolution process; training and education for relevant stakeholders; offering assistance for choosing the best process; alignment of the system with the overall mission of the organisation; and evaluation mechanisms, the current system could potentially be improved with the provision of multiple structural entry points to the system.

The NZ tax dispute resolution system appears as the worst placed of the four jurisdictions in terms of the number of DSD principles met. The prescribed system does not offer multiple structural entry points and there are generally limited opportunities available for taxpayers to choose a preferred path in the procedures. Conference facilitation during the administratively mandated conference phase and the potential availability of certain forms of ADR in the TRA and the High Court during the litigation stage, are the only times at which ADR is offered in the dispute resolution procedures. Furthermore, unlike the tax dispute resolution procedures of the other jurisdictions in this study, the NZ procedures require the prescribed exchange of documents at certain stages of the disputes process. As a consequence, the amount of duplication, time and cost associated with the dispute process have partly contributed towards negative perceptions of fairness of the NZ tax dispute resolution procedures being formed. Despite this, Inland Revenue apparently are not currently prepared to entertain the further use of ADR in the dispute resolution procedures.

As indicated above, the strengths of the dispute resolution systems of the UK and the US predominantly lie in certain aspects of DSD which are more related to the structure of the dispute resolution system, such as multiple structural access points, options for taxpayers to choose a preferred process and loop-forward procedures. The strengths of the Australian system mainly lie in the aspects of DSD which appear to be more related to the support and championship of the system, such as support of the system by top management and the alignment of the system (and ADR) with the mission, vision and values of the organisation. The NZ system appears to display some deficiencies both in terms of the structure of the system and the support and championship of the system.

In addition, across the four jurisdictions generally, some indications of negative perceptions of fairness of the operation of the jurisdictions' tax dispute resolution procedures are evident. Arguably this may be unavoidable in the particular context of tax dispute resolution due to the nature of the fundamental relationship between the tax authority and the taxpayer in tax disputes being a legal one rather than a relationship concerned with the underlying needs and concerns (interests) of the parties. Furthermore, the imbalance between the revenue authority and the taxpayer in dispute in terms of resources and knowledge may also contribute towards the existence of negative perceptions of fairness of the dispute resolution system and of the revenue authority. The effect of this imbalance and the consequent "burning off" of small taxpayers has been noted as a particular concern in the systems in NZ and Australia.

Table 6.1, which follows, provides a summary of the DSD evaluations of the four jurisdictions' tax dispute resolution systems and identifies similarities and differences in DSD evaluations for each DSD principle applied. The following points should be noted when reading Table 6.1:

- The DSD principles in the first column of Table 6.1 pertain to the DSD principles derived from the DSD literature in chapter 2, section 2.7, at Table 2.2 of this thesis.
- In most instances, the 'Similarities' column refers to DSD features that generally occur in the majority of the four jurisdictions' tax dispute resolution systems, but not necessarily in all four jurisdictions.
- The 'Differences' column refers to the DSD features in a particular jurisdiction which differ from the DSD features outlined in the Similarities column or where a particular jurisdiction has additional DSD features to those contained in the Similarities column.

Table 6.1: Comparative Table of the Dispute Systems Design Evaluations of the Four Jurisdictions

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
(1) Stakeholders are included in the design process. Stakeholders should have an active and integral role in creating and renewing the systems they use.	<ul style="list-style-type: none"> -Reviews of and submissions sought on the dispute resolution process. -The Generic Tax Policy Process (GTPP) builds public consultation into the development of tax policy concerning the NZ tax dispute resolution process. 	<ul style="list-style-type: none"> -Pilot ADR programs. -The ATO has commissioned a one-off survey of stakeholders' experiences with ADR. -Involvement of working groups and consultative committees. -Reviews of and submissions sought on the dispute resolution process. 	<ul style="list-style-type: none"> -Pilot ADR programs. -Consultation with external stakeholders, including representatives from the voluntary sector and the legal and accountancy professions. -Reviews of and submissions sought on the dispute resolution process. 	<ul style="list-style-type: none"> -Pilot ADR programs. -The Taxpayer Advocacy Panel (TAP) may receive suggestions from taxpayers. -Reviews of and submissions sought on the dispute resolution process. -Consultation with external stakeholders by the IRS Oversight Board. 	<ul style="list-style-type: none"> -Pilot ADR programs. -Reviews of and submissions sought on the dispute resolution process. -Consultation with external stakeholders is built into the design process. 	<ul style="list-style-type: none"> -In NZ there has been no pilot testing conducted prior to the introduction of ADR programs such as conference facilitation. -In Australia the ATO has commissioned a one-off stakeholder survey on ADR. -The US has a TAP which may receive suggestions from taxpayers.
(2) The system has multiple options for addressing conflict including interests, rights and power-based processes. The system should include interest-based processes and low-	<ul style="list-style-type: none"> -The system's options include: the opportunity for direct negotiation, the prescribed exchanges of documents at various stages, interests-based 	<ul style="list-style-type: none"> -Interests and rights-based ADR processes are available during the audit stage. -The system's options include: the opportunity for 	<ul style="list-style-type: none"> -Interests and rights-based ADR processes are available during HMRC's compliance checks. 	<ul style="list-style-type: none"> -Interests and rights-based ADR processes are available during the IRS examination stage. -The system's options include: 	<ul style="list-style-type: none"> -Interests and rights-based ADR processes are available during the audit stage. -The system's options include: 	<ul style="list-style-type: none"> -In NZ the system's options include the prescribed exchange of documents at certain stages and there are no interests and

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
cost rights and power-based processes should be offered should interest-based processes fail to resolve a dispute.	ADR processes (facilitation), internal review and litigation. -Interests and rights-based ADR processes are potentially available at the litigation stage.	direct negotiation, internal review, litigation, interests and rights-based ADR processes. -Interests and rights-based ADR processes are available at the litigation stage.	-The system's options include: the opportunity for direct negotiation, internal review, litigation, interests and right-based ADR processes. -Interests and rights-based ADR processes may be utilised once an appeal has been lodged with the Tribunals Service.	the opportunity for direct negotiation, internal review, litigation, interests and rights-based ADR processes. -Interests and rights-based ADR processes are available in the US Tax Court. -Independent TAS within the IRS is available where taxpayers have been unable to resolve problems themselves through normal IRS channels.	the opportunity for direct negotiation, internal review, litigation, interests and rights-based ADR processes. -Interests and rights-based ADR processes are available at the litigation stage.	rights-based ADR processes available at the audit stage. -The US has a TAS available where taxpayers have been unable to resolve problems themselves through normal IRS channels.
(3) The system provides for loops backward and forward. The system should include loop-back mechanisms which allow disputants to return from rights or power-based options back to interest-based options and also loop-	-The potential availability of ADR in the TRA and the High Court may provide loop-back mechanisms at the litigation stage. -Possible opt-out of the dispute process, following	-ADR processes, theoretically available at any stage of the dispute process (including the litigation stage), can provide loop-back mechanisms. -The EAR process in the AAT	-ADR once an appeal has been lodged with the Tribunals Service can provide a loop-back mechanism. -Possibility of by-passing the internal review process provides a loop-	-ADR potentially available in the US Tax Court at the litigation stage can provide a loop-back mechanism. -Possibility of by-passing the IRS Appeals process provides a loop-	-ADR at the litigation stage provides a loop-back mechanism. -A loop-forward mechanism is provided by the possibility for taxpayers to by-pass the internal review process.	-NZ (with the limited exception of the opt-out) and Australia both do not provide a loop-forward mechanism with respect to taxpayers generally being

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
forward mechanisms which allow disputants to move directly to a rights or power-based option without first going through all of the earlier interest-based options.	conference phase, provides a loop-forward mechanism.	provides a loop-back mechanism.	forward mechanism. -The joint application during a compliance check, by HMRC and the taxpayer for the determination of a specific matter by the tribunal, provides a loop-forward mechanism for that specific matter.	forward mechanism. -Specific IRS dispute resolution programs (for example, Accelerated Issue Resolution (AIR), Delegation Order 4-24 and Delegation Order 4-25) provide loop-forward mechanisms.		able to by-pass the internal review process. -Australia has an EAR process in the AAT which provides a form of loop-back mechanism. -The UK has a loop-forward mechanism where parties can make a joint application for the determination of specific matters by the tribunal. -The US has specific IRS dispute resolution programs providing loop-forward mechanisms.

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
<p>(4) There is notification before and feedback after the resolution process. Notification in advance of taking a proposed action affecting others can prevent disputes that arise through misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future.</p>	<ul style="list-style-type: none"> -The taxpayer's right to receive notification of a dispute is implied through the taxpayers' charter. -Notification is provided through Inland Revenue's compliance programme. -Notification is provided through Inland Revenue case notes. -Feedback on disputes occurs through the publication of general statistics. -Limited feedback on disputes occurs in Inland Revenue's annual reports. -Feedback is collected from participants at the conclusion of Inland Revenue's 	<ul style="list-style-type: none"> -The taxpayer's right to receive notification of a dispute is implied through the taxpayers' charter. -Notification is provided through the ATO's compliance strategy, "Building Confidence". -Notification is provided through the ATO's decision impact statements. -Feedback on disputes occurs through the publication of general statistics. -Feedback on disputes occurs in the ATO's annual reports. -Feedback is collected from participants at the conclusion of 	<ul style="list-style-type: none"> -The taxpayer's right to receive notification of a dispute is implied through the taxpayers' charter. -Notification is provided through HMRC's announcements of campaigns and taskforces. -Notification is provided through Revenue and Customs Briefs. -Feedback on disputes occurs through the publication of reviews and appeals statistics. -Feedback on disputes occurs through the publication of the Tax Assurance Commissioner's annual report. -Feedback is collected from 	<ul style="list-style-type: none"> -The taxpayer's right to receive notification of a dispute is implied through the Taxpayers' Bill of Rights. -Notification is provided through the IRS's Compliance and Enforcement news items. -Notification is provided through the IRS's Actions on Decisions (AODs). -Feedback on disputes occurs through the publication of general statistics. -Feedback on disputes occurs in the National Taxpayer Advocate's (NTA's) annual report to Congress. 	<ul style="list-style-type: none"> -The taxpayer's right to receive notification of a dispute is implied through the taxpayers' charter (or equivalent). -Notification is provided through the revenue authority's compliance activities and campaigns. -Notification is provided through case notes (or equivalents) on court decisions. -Feedback on disputes occurs through the publication of general statistics. -Feedback on disputes occurs through the publication of dispute matters in the revenue 	<ul style="list-style-type: none"> -In NZ limited feedback on disputes provided in Inland Revenue's annual reports. -In Australia feedback on disputes occurs through the maintenance of the ATO's internal ADR register.

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
	facilitated conferences.	certain ATO ADR programs. -Feedback on disputes occurs through the maintenance of the ATO's internal ADR register.	participants at the conclusion of HMRC's ADR programs.	-Feedback is collected from taxpayers at the conclusion of certain IRS ADR programs.	authority's annual reports. -Feedback is collected from participants at the conclusion of ADR programs.	
(5) The system has a person or persons who function as internal independent confidential neutral(s). Disputants should have access to an independent confidential neutral to whom they can go to for coaching, referring and problem-solving.	-The Legal and Technical Services (LTS) and Specialist Advice business units within Inland Revenue are able to provide technical advice and support to Inland Revenue staff on dispute resolution.	-The ATO's ADR Network is able to provide guidance and mentoring support to ATO case officers on ADR techniques.	-Operational teams which operate ADR in HMRC are able to provide support and feedback to HMRC staff on ADR.	-IRS Appeals Team Case Leaders (ATCLs) can mentor and coach IRS Appeals officers on dispute resolution and settlement skills. -The independent TAS within the IRS can provide free help and advice to taxpayers with IRS problems that they have been unable to resolve on their own.	-There is an internal unit or person which is available to mentor and provide advice to revenue authority staff on ADR techniques.	-In the US the TAS can provide free help and advice to taxpayers with IRS problems that they have been unable to resolve on their own.

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
(6) Procedures are ordered from low to high cost. In order to reduce the costs of handling disputes, the procedures in the system should be arranged in graduated steps in a low to high cost sequence.	<ul style="list-style-type: none"> -The formal procedures are not ordered from low to high cost. -Generally high upfront costs are incurred by taxpayers. 	<ul style="list-style-type: none"> -The formal procedures are ordered from low to high cost. -Generally high upfront costs are incurred by taxpayers. -The use of ADR adds additional costs at the stage of the dispute procedures at which it is utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes. 	<ul style="list-style-type: none"> -The formal procedures are ordered from low to high cost. -Generally high upfront costs are incurred by taxpayers. -The use of ADR adds additional costs at the stage of the dispute procedures at which it is utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes. 	<ul style="list-style-type: none"> -The formal procedures are ordered from low to high cost. -Generally high upfront costs are incurred by taxpayers. -The use of ADR adds additional costs at the stage of the dispute procedures at which it is utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes. 	<ul style="list-style-type: none"> -The formal procedures are ordered from low to high cost. -Generally high upfront costs are incurred by taxpayers. -The use of ADR adds additional costs at the stage of the dispute procedures at which it is utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes. 	<ul style="list-style-type: none"> -In NZ the formal procedures are not ordered from low to high cost.

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
(7) The system has multiple access points. The system should allow disputants to enter the system through many access points and offer a choice of persons to whom system users may approach in the first instance.	<ul style="list-style-type: none"> -The system does not have multiple structural entry points. -There are a range of different methods to deliver a Notice of Proposed Adjustment (NOPA (NZ)) or Notice of Response (NOR) to the other party. -The system offers a choice of persons to approach for non-English speaking taxpayers and for deaf, hearing-impaired or speech impaired taxpayers. -Multiple forms of access are provided by certain forms and guides available in English and Te Reo Maori. 	<ul style="list-style-type: none"> -The system does not have multiple structural entry points. -There are a range of different methods to deliver an objection to the ATO. -The system offers a choice of persons to approach for non-English speaking taxpayers, Indigenous Australians and for deaf, hearing-impaired or speech impaired taxpayers. -Multiple forms of access is provided by the provision of certain information to help people (which may be relevant to accessing the disputes system) 	<ul style="list-style-type: none"> -The system has multiple structural entry points for certain taxpayers. -The system offers a choice of persons to approach for non-English speaking taxpayers and for deaf, hearing-impaired or speech impaired taxpayers. -Multiple access points are available for blind or partially-sighted taxpayers through the provision of forms and information in Braille, large print and other alternative formats. -Multiple forms of access are provided by forms and guides available in 	<ul style="list-style-type: none"> -The system has multiple structural entry points. -Tax cases meeting certain criteria may enter the system using the small case procedures instead of the regular procedures available for filing an appeal with the IRS Appeals Office or a petition to the US Tax Court, respectively. -The system offers a choice of persons to approach for non-English speaking taxpayers and for deaf, hearing-impaired or speech impaired taxpayers. -Multiple access points are available for blind or partially-sighted 	<ul style="list-style-type: none"> -The systems in the UK and the US have multiple structural entry points. -The system offers a choice of persons to approach for non-English speaking taxpayers and for deaf, hearing-impaired or speech impaired taxpayers. -Multiple forms of access are provided by forms and guides available in different languages. -Multiple access points are available for blind or partially-sighted taxpayers through the provision of forms and 	<ul style="list-style-type: none"> -In NZ and Australia the systems have only one structural entry point. -In NZ and Australia there are a range of different methods through which the initial notification of a dispute may be delivered to the other party. -In the US there are separate entry procedures to the system available for small tax cases. -In the UK and the US multiple forms of access are provided by the availability of versions of the revenue authority's website in

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
		in different languages on the ATO's website.	English and Welsh. -Multiple forms of access are provided by the availability of the HMRC website in English and Welsh versions.	taxpayers through the provision of forms and information in Braille, large print and other alternative formats. -Multiple forms of access are provided by forms and guides available in different languages. -Multiple forms of access are provided by versions of the IRS website available in different languages.	information in Braille, large print and other alternative formats.	different languages.
(8) The system includes training and education. Training of stakeholders in conflict management as well as education about the dispute system and how to	-Information about the dispute resolution procedures is provided on Inland Revenue's website. -Publication of guides on the	-Information about the dispute resolution procedures is provided on the ATO's website. -Publication of guides on dispute	-Information about the dispute resolution procedures is provided on the HMRC's website. -Publication of guides on dispute	-Information about the IRS Appeals Office and on the IRS Appeals mediation programs is provided on the IRS website.	-Information about the dispute resolution procedures is provided on the revenue authority's website.	-In the UK and US, online learning modules for tax agents are provided by the revenue authority.

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
access it are necessary.	<p>dispute resolution procedures.</p> <p>-Inland Revenue Standard Practice Statement 16/05 (SPS 16/05) and Standard Practice Statement 16/06 (SPS 16/06) provide guidelines on the dispute resolution procedures for Inland Revenue staff and taxpayers.</p> <p>-Training in dispute resolution is available to Inland Revenue staff where it is identified as part of their development plans. It may be delivered by internal or external providers.</p> <p>-Inland Revenue facilitators receive an initial two days</p>	<p>resolution and ADR.</p> <p>-The ATO's Practice Statement Law Administration 2013/3 (PS LA 2013/3) provides policies and guidelines to be followed by ATO staff in using ADR.</p> <p>-Documents such as the ATO's Disputes Policy, Dispute Management Plan and Code of Settlement provide information on the ATO's dispute resolution approach.</p> <p>-ATO case officers may have training in negotiation skills conducted by an in-house training provider.</p>	<p>resolution and ADR.</p> <p>-Online "Learning Together" module for tax agents.</p> <p>-HMRC's Appeals Reviews and Tribunal Guidance (ARTG) manual provides technical guidance on the review and appeal processes for HMRC staff.</p> <p>-HMRC documents such as practical guidance on ADR for HMRC staff, commentary on the LSS and the Code of Governance for resolving tax disputes, provide information on HMRC's use of ADR and on HMRC's dispute resolution approach.</p>	<p>-Separate website providing information about the TAS.</p> <p>-Self-help tools for the IRS Appeals process and for ADR are provided on the IRS website.</p> <p>-Publication of guides on the IRS Appeals system and IRS ADR.</p> <p>-The IRS Internal Revenue Manual (IRM), revenue procedures, notices and announcements provide guidance for IRS staff, taxpayers and other stakeholders.</p> <p>-IRS Nationwide Tax Forums and IRS Nationwide Tax Forums Online provide seminars, workshops and</p>	<p>-Publication of guides on the dispute resolution procedures.</p> <p>-Guidelines on the dispute resolution procedures for revenue authority staff and taxpayers.</p> <p>-Other documents such as dispute policies and ADR guidance for staff, published by the revenue authority.</p> <p>-The general in-house training of revenue authority staff includes a component on conflict management and resolution.</p> <p>-Revenue authority</p>	<p>-In the US, the IRS website includes online self-help tools for taxpayers and LITCs may provide education to qualifying low income taxpayers.</p>

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
	<p>of training in mediation from the Arbitrators' and Mediators' Institute of New Zealand (AMINZ).</p> <p>-Inland Revenue additionally have commenced AMINZ accreditation of Inland Revenue facilitators.</p>	<p>-ATO facilitators receive five days of mediation training from Resolution Institute or the Australian Disputes Centre (ADC).</p> <p>-The ATO's Dispute Management curriculum is used to provide targeted training to ATO staff as part of their personal development agreements.</p>	<p>-HMRC officers are trained to work "collaboratively where possible" as part of their compliance training.</p> <p>-HMRC facilitators for the large or complex cases ADR program are externally trained and accredited by Centre for Effective Dispute Resolution (CEDR) in mediation techniques and HMRC SMEi ADR program facilitators are trained in-house by HMRC instructors.</p>	<p>training for tax agents.</p> <p>-Low Income Taxpayer Clinics (LITCs) can provide education about taxpayer rights for low income taxpayers.</p> <p>-IRS Appeals employees receive general training from in-house IRS Appeals instructors with some special courses provided by contract instructors.</p> <p>-IRS Appeals employees who act as mediators are trained in-house by IRS Appeals employees using a training regime developed by the National Mediators Association.</p>	<p>facilitators or mediators receive specialised training in mediation developed by external ADR specialists.</p>	

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
(9) Assistance is offered for choosing the best process. This includes the use of guidelines and/or coordinators and process advisors to ensure the appropriate use of processes.	<p>-Inland Revenue SPS 16/05 and SPS 16/06 provide guidelines and timeframes for Inland Revenue officers and taxpayers to ensure the appropriate use of processes.</p> <p>-Inland Revenue's Investigations and Advice group has general oversight of the dispute resolution process and its Specialist Advice team is responsible for the administration of facilitated conferences.</p>	<p>-The ATO's PS LA 2013/3 provides guidelines on when ADR may or may not be appropriate for a dispute.</p> <p>-The ATO's Review and Dispute Resolution (RDR) business line provide advice on ADR.</p> <p>-Requests for ADR are reviewed for their appropriateness by the relevant ATO manager(s) and ATO technical staff (including RDR officers).</p> <p>-The ATO's EAR process assists large business taxpayers in deciding whether to request an amendment or</p>	<p>-HMRC's ARTG manual provides guidelines for HMRC staff and taxpayers to ensure the appropriate use of processes.</p> <p>-HMRC's practical guidance on ADR for HMRC staff provides guidelines on when ADR may or may not be appropriate for a dispute.</p> <p>-HMRC Customer Relationship Managers (CRMs) or case owners can act as process advisors to large business taxpayers.</p> <p>-HMRC operational teams can provide advice on the suitability of ADR.</p> <p>-Requests for ADR are considered and reviewed for their</p>	<p>-IRS revenue procedures provide guidelines on the types of cases appropriate for ADR.</p> <p>-Taxpayers can contact the IRS employee they have been dealing with or call Taxpayer Service for process advice on the IRS Appeals process.</p> <p>-IRS online self-help tools provide assistance on whether to file an appeal and on the selection of IRS Appeals mediation programs.</p> <p>-Toll-free hot-line to help taxpayers and tax practitioners with questions on the Small Business/Self-Employed (SB/SE) Fast</p>	<p>-Revenue authority guidelines on the dispute resolution procedures to ensure the appropriate use of processes.</p> <p>-There is a unit within the revenue authority responsible for overseeing the ADR programs and are available to provide advice on them.</p> <p>-Requests for ADR must be approved by the relevant staff from the above unit.</p>	<p>-In Australia the ATO's EAR process can be used by large business taxpayers in deciding whether to request an amendment or lodge an objection.</p> <p>-In the US, the IRS's online self-help tools can assist taxpayers with the selection of processes. There is also a toll-free hot-line for providing advice on the SB/SE FTS ADR program.</p>

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
		lodge an objection.	appropriateness by facilitators within HMRC's operational teams (and in certain circumstances, a governance panel).	Track Settlement (FTS) ADR program. -IRS Appeals generally managers act as process advisors to the parties on the appropriate use of ADR. -Requests for ADR must be approved by an IRS Appeals manager.		
(10) Disputants have the right to choose a preferred process. The best systems are multi-option with disputants selecting the process.	-With the exception of the opt-out, taxpayers generally must follow the prescribed dispute resolution procedure under Part IVA TAA 1994 in full and are unable to truncate the process. Thus, taxpayers generally cannot choose between having an internal	-Taxpayers must lodge an objection with the ATO (and be dissatisfied with the ATO's objection decision) before appealing to the AAT or the Federal Court of Australia. Thus, taxpayers cannot choose between having an internal review and appealing externally.	-Taxpayers can choose to have a review of HMRC's decision or notify their appeal to the tribunal or do both. -HMRC ADR is available alongside taxpayers' existing review and appeal rights and their usual review and appeal rights are unaffected if the dispute remains unresolved in	-Taxpayers can choose to make an appeal to the IRS Appeals Office or file a petition with the US Tax Court or do both. -Parties can choose to use various IRS ADR programs available at certain stages of the formal dispute resolution process. For certain applicable IRS ADR programs, if	-Taxpayers can choose between having an internal review, appealing externally or doing both. -The choice for taxpayers to use ADR is available alongside taxpayers' existing review and appeal rights, and their usual review and appeal rights are	-In NZ (excepting the limited exception of the opt-out) and Australia, taxpayers generally must go through the internal review process before appealing externally. Thus, taxpayers generally cannot choose between having an

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
	<p>review and appealing externally.</p> <p>-The opt-out provides a limited option for certain qualifying taxpayers (including small taxpayers) to truncate the dispute process.</p> <p>-Taxpayers have the option of having any conference meetings facilitated.</p> <p>-Parties may choose to consent to ADR at the litigation stage in the TRA or High Court.</p>	<p>-Taxpayers can choose to use ADR at any stage of the formal dispute process and their usual review and appeal rights are unaffected if the dispute remains unresolved in whole or in part following ADR.</p> <p>-Parties can choose to request that a matter be referred to mediation in the Federal Court of Australia prior to commencing formal proceedings.</p>	<p>whole or in part following ADR.</p> <p>-HMRC ADR is available as an option for taxpayers once an appeal has been lodged with the Tribunals Service.</p>	<p>an agreement (in whole or in part) is unable to be reached following ADR, the taxpayer retains all of their otherwise applicable appeal rights to request traditional IRS Appeals consideration of unresolved issues.</p> <p>-Parties can choose to use arbitration or mediation in the US Tax Court before commencing formal Court proceedings.</p> <p>-In the US Tax Court, qualifying taxpayers may choose to use the small case procedure or the regular procedure.</p> <p>-The TAS can be used alongside the formal dispute</p>	<p>unaffected if the dispute remains unresolved (in whole or in part) following ADR.</p> <p>-Parties can choose to use ADR in the tribunal or court systems if it is appropriate.</p>	<p>internal review and appealing externally.</p> <p>-In the US qualifying taxpayers may choose to have matters dealt with in the US Tax Court using small case procedures.</p> <p>-In the US the TAS can potentially be used alongside the formal dispute resolution process.</p>

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
				resolution process where a taxpayer has not been able to resolve an IRS problem on their own or believe that an IRS procedure is not working as it should.		
(11) The system is fair and perceived as fair. The system should be fair to parties and foster a culture that welcomes good faith dissent.	-There have been concerns that the NZ tax dispute resolution procedures are too lengthy and costly and in particular, small taxpayers are being “burnt off” by the process. This is arguably negatively impacting on taxpayers’ perceptions of fairness of the system and thereby, on voluntary compliance.	-There have been mixed perceptions on the operation of the ATO’s dispute resolution procedures. Some stakeholders believe that the procedures work well with staff appropriately engaged to resolve disputes. While other stakeholders have expressed concerns over the ability and authority of ATO staff to engage in discussions with taxpayers and resolve disputes.	-Concerns with HMRC’s governance processes for handling large tax disputes have had a negative impact on taxpayers’ perceptions of fairness of the dispute procedures. -There are mixed findings on the perceptions of fairness of the use of HMRC staff as facilitators in HMRC’s ADR programs.	-Concerns by stakeholders with respect to the fairness, independence and impartiality of the IRS Appeals Office led to the Appeals Judicial Approach and Culture (AJAC) project initiated by IRS Appeals in 2012. -There have been concerns expressed in the literature with respect to the impartiality of IRS mediators utilised in IRS ADR programs.	-Across the four jurisdictions, generally there have been some indications of negative perceptions of fairness of the jurisdictions’ respective tax dispute resolution procedures. -Across the four jurisdictions, generally there are mixed findings on the perceptions of fairness on the use of revenue authority staff as	-In NZ and Australia there are concerns with respect to the fairness of the dispute resolution procedures in particular for small taxpayers. -In Australia and the US there are concerns with respect to the independence of the review function of the revenue authority from the audit or compliance function.

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
	<p>-There are mixed findings on the perceptions of fairness of the use of Inland Revenue staff as facilitators in Inland Revenue's facilitated conferences.</p>	<p>-There have been concerns with respect to the imbalance of power between the ATO and in particular small taxpayers in tax disputes.</p> <p>-There have been concerns with respect to the independence of the ATO's objection and review function from its compliance function.</p> <p>-There are mixed findings on the perceptions of fairness of the use of ATO staff as facilitators in ATO's ADR programs.</p> <p>-There are mixed findings on the perceived independence of</p>		<p>-The issue of confidentiality and lack of restrictions on ex parte communications are particular concerns of the IRS's FTS program.</p>	<p>facilitators or mediators in the revenue authorities' ADR programs.</p>	<p>-In the US there are additional concerns in IRS ADR programs with respect to confidentiality and lack of restrictions on ex parte communications.</p>

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
		the ATO's independent review process.				
(12) The system is supported by top managers. There should be sincere and visible championship by senior management.	<p>-There is limited evidence of the sincere championship of the dispute resolution system and of ADR by way of published speeches, media statements or other releases by the NZ Commissioner.</p> <p>-Inland Revenue apparently are not currently prepared to entertain the further use of ADR in the dispute procedures.</p>	<p>-Championship of a dispute resolution culture and of ADR are recurring themes in the Australian Commissioner's speeches.</p> <p>-Changes in the organisational structure of the ATO have included the RDR business line, led by the Deputy Commissioner, being responsible for, inter alia, championing the use of ADR.</p> <p>-The Second Commissioner Law Design and Practice and the Deputy Commissioner, RDR have made a number of</p>	<p>-There is limited evidence of the sincere championship of the dispute resolution system and of ADR by way of published speeches, media statements or other releases by HMRC's Executive Chair and Chief Executive.</p> <p>-Some degree of championship of the dispute resolution system is evident with the creation of the role of HMRC's Tax Assurance Commissioner.</p> <p>-There appears to be limited evidence of the championship of</p>	<p>-There is limited evidence of the sincere championship of the dispute resolution system and of ADR by way of published speeches, media statements or other releases by the IRS Commissioner.</p> <p>-There is evidence of some degree of championship of the IRS Appeals process and of the IRS Appeals ADR programs by way of presentations made by the Chief of IRS Appeals.</p> <p>-Commentators have observed that the IRS has been reluctant to fully embrace ADR due to the well-</p>	<p>-Generally across the jurisdictions (except for Australia), there is limited evidence of the sincere championship of the dispute resolution system and of ADR, by way of published speeches, media statements or other releases by the Commissioners (or equivalents) of the revenue authorities.</p>	<p>-In Australia championship of a dispute resolution culture in the ATO and of ADR are evident in the speeches of the Australian Commissioner, Second Commissioner Law Design and Practice and the Deputy Commissioner, RDR.</p> <p>-In the UK there is some degree of championship of the dispute resolution system with the creation of the role of HMRC's Tax Assurance Commissioner.</p>

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
		speeches and presentations on the ATO's approach towards dispute resolution and ADR.	HMRC's ADR programs since their incorporation into "business as usual" by HMRC.	established negotiation procedures of the IRS Appeals Office.		-In the US there is some degree of championship of the IRS Appeals process and its ADR programs in presentations given by the Chief of IRS Appeals.
(13) The system is aligned with mission, vision and values of the organisation. The system should be integrated into the organisation and reflect the organisational mission, vision and values.	-The disputes system is integrated into the organisation through the taxpayers' charter. -Prima facie, there is no clear alignment between the purpose of the dispute procedures under s 89A TAA 1994 and the mission, vision and values of Inland Revenue. However, it has been recognised that way disputes are resolved	-The disputes system is integrated into the organisation through the taxpayers' charter. -The ATO's approach to dispute resolution, outlined in its Disputes Policy and Dispute Management Plan, appears to generally align with the ATO's overall mission, vision, values and goals.	-The disputes system is integrated into the organisation through the taxpayers' charter. -HMRC's approach to dispute resolution outlined in the LSS appears to generally align with HMRC's strategic objectives. -However, the LSS arguably restricts the use of ADR as a means of resolving disputes.	-The disputes system is integrated into the organisation through the IRS's Taxpayer Bill of Rights. -The mission of the IRS Appeal's Office appears to generally align with the overall mission statement of the IRS. -The dispute resolution system is not an aspect which is included in the IRS's	-The disputes system is integrated into the organisation through the revenue authority's taxpayers' charter (or equivalent). -The revenue authority's approach towards dispute resolution outlined in its Disputes Policy (or equivalent) generally aligns with its overall	-In NZ there is, prima facie, no clear alignment between the purpose of the procedures outlined in s 89A of the TAA 1994 and the vision, mission and values of Inland Revenue. -In Australia, the dispute resolution system is an aspect which has been included in the ATO's <i>Corporate Plan</i>

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
	<p>affects taxpayer perceptions of fairness and has wider impacts for the tax administration.</p> <p>-The dispute resolution system is not an aspect which is included in Inland Revenue's current <i>Statement of Intent</i>.</p>	<p>-The dispute resolution system is an aspect which has been included in the ATO's <i>Corporate Plan</i>.</p> <p>-The Australian Commissioner has included dispute resolution as a key area of focus in the "Reinventing the ATO" project.</p>	<p>-The dispute resolution system is not an aspect which is included in HMRC's <i>Single Departmental Plan 2015 to 2020</i>.</p>	<p>current <i>Strategic Plan</i>.</p>	<p>mission, vision and values.</p> <p>-In NZ, the UK and the US, the dispute resolution system is not an aspect which features in the Strategic Plans (or equivalent) of the revenue authorities.</p>	<p>and its "Reinventing the ATO" project.</p>
<p>(14) There is evaluation of the system. This acts to identify strengths and weaknesses of design and foster continuous improvement.</p>	<p>-Taxpayers can provide general feedback to Inland Revenue through completing an online form.</p> <p>-Participants in Inland Revenue's facilitated conferences are invited to complete a feedback form following the completion of the facilitation process.</p>	<p>-Taxpayers can provide general feedback to the ATO by phone, fax, mail or completing an online form.</p> <p>-Participants in the ATO's ADR programs are invited to complete a feedback form following the completion of the ADR process.</p>	<p>-Evaluation at the ADR policy level is conducted by HMRC's Tax Assurance and Resolution Policy (TARP) team.</p> <p>-Participants in HMRC's ADR programs are invited to provide feedback to the relevant HMRC operational team following the completion of the ADR process.</p>	<p>-Evaluation occurs through the IRS Appeals Customer Satisfaction Survey.</p> <p>-Participants in certain IRS ADR programs are invited to complete a Customer Satisfaction Survey following the completion of the ADR process.</p> <p>-Evaluation can possibly occur through the TAP</p>	<p>-Taxpayers can provide general feedback (for evaluation) to the revenue authority, for example, through completing online forms.</p> <p>-Participants in ADR programs are invited to provide feedback (for evaluation) on their completion of the ADR process.</p>	<p>-In NZ evaluation of the tax dispute resolution system generally does not feature in Inland Revenue's annual reports.</p> <p>-In the US evaluation can occur through the TAP who can conduct outreach to solicit suggestions and</p>

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
	<p>-Evaluation occurs through reviews on and submissions sought on the dispute system by Inland Revenue's Policy and Strategy group and the NZ Treasury.</p> <p>-Evaluation of the system occurs through the Chartered Accountants Australia and New Zealand (CA-ANZ) and Tax Management New Zealand's (TMNZ's) annual IR Satisfaction Survey.</p> <p>-Evaluation of the system may potentially occur through performance audits conducted by the Controller and Auditor-General.</p>	<p>-Evaluation of the system can occur through regular surveys conducted by external agencies to monitor stakeholders' perceptions of the tax dispute resolution system.</p> <p>-Evaluation of the system is provided by one-off surveys such as the Australian Centre for Justice Innovation's (ACJI's) ADR user experience survey.</p> <p>-Evaluation of the system is provided by government-appointed entities, including the IGT and the Australian National Audit Office (ANAO).</p> <p>-Evaluation of the disputes system</p>	<p>-One-off project evaluation summaries have been published by HMRC following the completion of its ADR pilot programs.</p> <p>-Evaluation of the system occurs through regular and one-off surveys conducted by external agencies on customers' perceptions and experiences of HMRC's internal review process.</p> <p>-Evaluation of the system is provided through HMRC's Tax Assurance Commissioner's annual report.</p> <p>-Evaluation of the system is provided by the National Audit Office (NAO) and</p>	<p>who may conduct outreach to solicit suggestions and ideas from citizens on the disputes system.</p> <p>-Evaluation can occur through the NTA's annual reports to Congress.</p> <p>-Evaluation can occur through the IRS Oversight Board's annual reports to Congress and other special reports produced.</p> <p>-Evaluation of the system is provided by federal oversight organisations such as the US Government Accountability Office (US GAO) and the Treasury Inspector-General for Tax</p>	<p>-Evaluation of the system can occur through regular or one-off surveys conducted for the revenue authority by external agencies.</p> <p>-Evaluation of the system occurs through various revenue authority reports, including annual reports.</p> <p>-Evaluation of the system can be provided by submissions, reviews and reports from government-appointed entities, parliamentary committees and other external stakeholders.</p>	<p>ideas from citizens on the dispute system.</p>

DSD Principles	New Zealand	Australia	The United Kingdom	The United States	Similarities	Differences
	-Evaluation of the disputes system may be included in various reviews of and reports on the NZ tax administration system by parliamentary committees.	can occur in various reviews of and reports by parliamentary committees.	parliamentary committees such as the Public Accounts Committee (PAC) and Treasury Select Committee.	Administration (TIGTA).		

6.3 The Tax Dispute Systems Design Principles

The purpose of the following subsections is to discuss the modifications made to the general DSD principles (section 6.3.1) and on basis of these modifications, derive a set of tax DSD principles (section 6.3.2).

6.3.1 Modifications made to the dispute systems design principles

In deriving the tax DSD principles in Table 6.2 below, some modifications have been made to the original set of DSD principles derived from the DSD literature set out in chapter 2, section 2.7 of this thesis. For most of the DSD principles the provision of examples of the DSD principle applied in the context of tax dispute resolution or the provision of a more detailed explanation with respect to the application of the DSD principle in the tax context were the only changes made. Accordingly, in most cases, substantive changes to the DSD principles were not required.

For DSD Principle 1, the provision of examples of stakeholder involvement in the design process in the tax dispute resolution context was the only modification made. These include stakeholder involvement in pilot ADR programs, and in reviews and consultations on the tax dispute resolution system.

In relation to DSD Principle 2, examples of options available for addressing disputes in the tax dispute resolution context are also provided. These include direct negotiation, internal review, litigation, and interests and rights-based ADR processes. The availability of ADR options at the audit and litigation stages is also included given that in all four jurisdictions (except NZ), ADR is generally available as an option at both of these stages. While power-based approaches have not been explicitly referred to in the DSD evaluations of the four jurisdictions' tax dispute resolution systems under DSD Principle 2, they are nevertheless applicable in the respect that, in certain circumstances, revenue authorities have the ability to exercise their powers to impose tax, interest and penalties on the taxpayer. Taxpayers arguably, to some extent, can also utilise a power-based approach in refusing to pay a tax debt.¹ These approaches broadly fall within Ury, Brett and Goldberg's definition of power, "the ability to coerce someone to do something he would not otherwise do. Exercising power typically means imposing costs on the other side or threatening to do so."² However, in the tax dispute context, the abovementioned power-based procedures are not built into the design of the system by the dispute system designer per

¹ See, for example, Hamish Fletcher "Bankruptcy declared for \$500m IRD battler" *The New Zealand Herald* (online ed, Auckland, 19 November 2015), concerning the long-running tax battle in NZ between John Russell and Inland Revenue. See also, *Russell v Commissioner of Inland Revenue* [2015] NZHC 2353.

² William L Ury, Jeanne M Brett and Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, Cambridge, MA, first published 1988, 1993 ed) at 7.

se. Thus, the power-based approaches in the tax dispute context contrast with power-based approaches in the context of workplace disputes where, for example, employees' legal right to strike (a power-based approach) may be incorporated within the system under employment law.³

The description of loop-back and loop-forward mechanisms has been retained in tax DSD Principle 3 given that 'loop-back' and 'loop-forward' are DSD terms and system stakeholders in the context of tax dispute resolution may not necessarily be familiar with such terms. Examples of loop-back and loop-forward mechanisms in the tax dispute resolution context are also provided. These include loop-back mechanisms provided by the availability of ADR options at the litigation stage and loop-forward mechanisms provided by the ability for taxpayers to by-pass the revenue authority's internal review process and proceed to litigation.

The description of notification before and feedback after the dispute resolution process for DSD Principle 4 has also been retained given that stakeholders may not be aware of the meaning of notification and feedback in DSD terms.⁴ In addition, examples of notification and feedback are provided in the context of tax dispute resolution. However, it is worth noting that the majority of the examples given are forms of notification and feedback which are provided by the revenue authority to the body of taxpayers generally rather than notification and feedback given with respect to a specific dispute. In the context of organisational disputes, notification refers to the giving of "an announcement [by one party to another] in advance of the intended action."⁵ In the tax disputes context, the primary form of notification of a dispute by the revenue authority to a taxpayer involved in a particular dispute is the notification implied in the revenue authority's taxpayers' charter (or equivalent) which obliges the revenue authority to, for example, clearly stipulate its decisions and what actions it is taking in relation to a taxpayer's affairs, and provide an explanation of its reasons. Otherwise, notification of tax disputes by the revenue authority is provided to taxpayers generally, such as through the revenue authority's compliance activities and campaigns which provide announcements to the general body of taxpayers of potential areas where tax disputes may arise. Publication of revenue authority case notes on court decisions can also serve as a form of notification to taxpayers generally as they can provide the revenue authority's view on the implications of a particular court or tribunal decision.

Similarly, feedback on tax disputes is provided by the revenue authority to taxpayers in general, such as through the publication of general statistics on disputes on the website of the revenue

³ See, for example, in the NZ employment relations context, section 8 of the Employment Relations Act 2000 which provide for lawful strikes and lockouts in relation to collective bargaining.

⁴ This was based on feedback from the pilot test interviews (which included the testing of the supplementary information document that interviewees were required to read prior to the interview).

⁵ Ury, Brett and Goldberg, above n 2, at 61.

authority and through the publication of dispute outcomes in the revenue authority's annual report. In addition, post-dispute feedback at the micro-level is usually collected by revenue authorities from participants involved in revenue authority ADR and other dispute resolution programs. Although, it appears that in most of the jurisdictions in this study, the post-dispute feedback collected on these programs primarily serves as a means for revenue authorities to evaluate and improve their processes as opposed to providing a basis for decision making for taxpayers in future tax disputes.

Pertaining to DSD Principle 5, internal independent confidential neutrals in the context of organisational disputes refers to an individual who has an independent reporting relationship to the president or governing body of an organisation who can provide confidential assistance to any individual, from hourly workers to board members as well as customers or business partners to solve a problem.⁶ They can provide the following kinds of support to anyone seeking assistance: listening, coaching, offering options, informal fact finding and promoting systemic change.⁷ In the context of tax dispute resolution, in practice internal independent confidential neutrals serving both the revenue authority and taxpayers in dispute, generally do not exist. This is largely due to the fact that tax disputes (as defined earlier in this thesis in chapter 2, section 2.2.1) occur between the revenue authority and an external party (the taxpayer). Furthermore, the dispute between the parties is generally not focused on the needs and concerns of the parties, but rather on resolving disagreements over substantive tax issues.

However, within the revenue authorities of the jurisdictions in this study, an internal person or unit that functions as a mentor or advisor to revenue authority staff on dispute resolution and ADR techniques is usually present. In the tax dispute resolution context, given that the dispute occurs between the revenue authority and the taxpayer as an external party, arguably it would not be appropriate for the revenue authority to provide the equivalent assistance in mentoring and advising taxpayers on dispute resolution and ADR techniques. Although, it would be reasonable to expect taxpayers to seek such assistance externally (for example, from legal advisors) in the same way as they would seek professional advice and assistance in relation to the technical tax matters pertaining to the dispute. Accordingly, as shown in Table 6.2 below, the wording of DSD Principle 5 has been modified to reflect the inclusion of an internal person or unit that acts as a mentor and advisor on ADR techniques for revenue authority staff as opposed to for both disputants.

With respect to DSD Principle 6, the formal tax dispute resolution procedures of the jurisdictions (except NZ) are generally arranged in a low to high cost sequence. However, in the tax dispute resolution context, this is subject to the following exceptions. The first exception

⁶ Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998) at 136.

⁷ At 136.

is that, in general, high upfront costs may be incurred by taxpayers in working out their positions at the outset of a dispute. These upfront costs may include the time spent by taxpayers in preparing for and participating in negotiations, as well as the cost of professional advisors. The incurrence of upfront costs by taxpayers may be particular to the context of tax dispute resolution given that: “Because of the technical nature of tax law, self-represented [taxpayers] are unlikely to be able to do justice to their cases unless they possess considerable tax expertise themselves.”⁸ Hence, the need for professional advice and assistance. The second exception is that, in the tax dispute resolution procedures of the jurisdictions in this study (except NZ) taxpayers can choose to use ADR potentially at any stage of the formal dispute process.⁹ Accordingly, the use of ADR can add additional costs at the stage of the formal dispute procedures at which it is utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes and thus, there may be an overall cost saving to the parties. Consequently, as shown in Table 6.2, additional explanation has been provided in DSD Principle 6 to reflect the above exceptions in the context of tax dispute resolution.

Multiple access points to the dispute resolution system for DSD Principle 7 can be provided both structurally and procedurally. As illustrated by the tax dispute resolution systems in the UK and the US, multiple structural access points in the context of tax dispute resolution can be characterised by the ability to enter the system at different levels, namely at the internal review and the external appeal levels. Whereas multiple access points in the procedural respect may be characterised by providing a range of different means for taxpayers to enter the system. For example, the initial notification of a dispute by a taxpayer may be provided by methods such as by post, fax, personal delivery or electronic means of communication. Multiple procedural forms of access to the system can also be provided to certain taxpayers through the provision of forms and guides in different languages or in alternative formats such as Braille, large text, audio on CD and text on CD.

Furthermore, in the context of organisational disputes, multiple access points are primarily used to refer to the provision of a choice of persons to whom system users may approach in the first instance. This entails that “people with concerns and problems can find access points of different ethnicity and gender, and varied technical backgrounds, to help them.”¹⁰ Applying

⁸ Binh Tran-Nam and Michael Walpole “Independent tax dispute resolution and social justice in Australia” (2012) 35(2) UNSWLJ 470 at 497.

⁹ The ability to choose to use ADR at any stage of the process differs from dispute resolution systems where ADR is included as a mandatory step within the system. For example, in the context of NZ employment relations disputes, under section 159 of the Employment Relations Act 2000, generally parties must have attempted mediation as a step before bringing their dispute to the Employment Relations Authority for determination.

¹⁰ Mary P Rowe “Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?” in Sandra Gleason (ed) *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (Michigan State University Press, East Lansing, 1997) 79 at 88.

this to the tax dispute resolution systems in this study, it is observed that a choice of persons to approach in the first instance for certain taxpayers (for example, non-English speaking taxpayers, deaf, hearing-impaired and/or speech-impaired taxpayers) is provided by the tax authorities in the four jurisdictions. The choice of persons may include bi-lingual or multi-lingual persons (provided by the revenue authority or by external providers) and persons from national relay services. Notwithstanding that the above examples offer taxpayers in special circumstances with a choice of persons in making contact with the revenue authority in general, they arguably may also serve to provide a choice of access persons for certain taxpayers to approach to acquire information about dispute resolution system in the first instance.

For DSD Principle 8, the provision of examples of forms of training and education of stakeholders in the tax dispute resolution context was the only modification made. Examples of training and education in the tax context include: the general in-house training received by revenue authority staff including a component on conflict management and resolution; revenue authority staff acting as facilitators and mediators receiving training in mediation developed by external ADR specialists; and education about the dispute resolution system provided on the revenue authority's website, through the publication of forms and guides, revenue authority guidelines on the dispute resolution procedures and online learning material for tax agents. However, as noted under DSD Principle 5, it would generally not be the responsibility of the revenue authority to provide training in dispute resolution skills and techniques to taxpayers (as distinct from providing training in dispute resolution to revenue authority staff).

In relation to DSD Principle 9, process advisors in the organisational dispute resolution context typically take the form of internal ombudspersons or human resource departments which provide internal mechanisms to assist parties in selecting and using available conflict management options in the organisation.¹¹ In the tax dispute resolution context, process advisors generally take the form of a unit or team within the revenue authority that is responsible for administering and overseeing the revenue authority's ADR programs and which is available to provide assistance to parties in relation to the appropriate use of ADR processes. In addition, requests for ADR usually must be reviewed and approved for their appropriateness by relevant staff from the unit or team.

DSD Principle 10 provides that disputants should have the right to choose a preferred process from multiple options, some of which may be available simultaneously. In the context of tax dispute resolution, multiple options (primarily relevant to taxpayers) can be provided in a number of ways. For example, it may be that taxpayers can choose to have an internal review, appeal externally or do both. Multiple options can further be provided in the respect that there may be the option to use ADR alongside taxpayers' existing review and appeal rights and

¹¹ Slaikeu and Hasson, above n 6, at 54.

furthermore, taxpayers' usual review and appeal rights are unaffected if the dispute remains unresolved (in whole or in part) following ADR. Multiple options also apply in the tax dispute resolution context where parties have the option of using ADR (or requesting that the matter be referred to ADR) prior to commencing formal proceedings when a dispute reaches a tribunal or court. A further provision for multiple options can occur where qualifying taxpayers are provided with the option to have matters dealt with in a tribunal or court using 'small' tax case procedures instead of the regular procedures.

DSD Principle 11 relates to the fairness and perceived fairness of the system. As noted in section 6.2.5 above, across the four jurisdictions, there are some indications of negative perceptions of fairness of the tax dispute resolution systems. A particular concern highlighted in Australia and the US is the perceived independence of the review function of the revenue authority from the audit or compliance function. Furthermore, the DSD evaluations of the four jurisdictions indicate that, in addition to the perceived fairness of the dispute resolution system as a whole, the fairness and perceived fairness of revenue authority staff acting as facilitators or mediators in revenue authority ADR programs is also regarded by stakeholders an important factor with regard to fairness in the tax dispute resolution context. The cases studies indicate that across the four jurisdictions, there are generally mixed findings with respect to the perceived fairness and neutrality of revenue authority staff acting as facilitators or mediators.

In relation to DSD Principle 12, support by top management in the organisational dispute context envisages that "at least one senior person must be a visionary who champions the cause of creating a conflict-competent culture through developing and maintaining [the] conflict management system"¹² The champion's passion inspires others to act. It is this ability to connect others to a vision that is said to drive the success of a program.¹³ In the context of tax dispute resolution, championship of the dispute resolution system would generally be provided by the Commissioner (or equivalent) and also by senior members of the revenue authority that hold responsibility for dispute resolution in the organisation. Furthermore, evidence of the championship of tax dispute resolution systems appears to be most visibly provided in the form of speeches, media releases and presentations.

For DSD Principle 13, examples of integration of the dispute resolution system in the organisation and alignment of the revenue authority's dispute resolution approach with the mission, vision and values of the organisation in the tax dispute resolution context are provided. In the context of organisational disputes, Slaikeu and Hasson suggest that conflict management systems may be integrated within an organisation through, inter alia, clarifying policy pertaining to conflict management, defining roles and responsibilities in relation to the system,

¹² Society of Professionals in Dispute Resolution *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations* (Washington DC, 2001) at 14.

¹³ At 14.

and creating or revising documentation including contract clauses and employee manuals.¹⁴ In the context of tax dispute resolution, taxpayers' charters (or equivalents) of revenue authorities can provide a mechanism through which the tax dispute resolution system may be integrated into the organisation. They typically contain a commitment by the revenue authority to provide taxpayers with a right to appeal against a tax decision that they disagree with. However, it should be noted that taxpayers' charters contain aspirations of the revenue authority only and thus, are not legally binding on them. In addition, the revenue authority's approach toward dispute resolution may be documented in the dispute policies of the revenue authority (for example, the ATO's Disputes Policy¹⁵ and Dispute Management Plan,¹⁶ and HMRC's LSS¹⁷). Following Slaikeu and Hasson, written policies should reflect a clear link between the conflict management system and the organisational mission.¹⁸ Future plans with respect to the dispute resolution system may also feature in the Strategic Plans of revenue authorities.

The provision of examples of evaluation of the system in the context of tax dispute resolution was the only modification made to DSD Principle 14. Evaluation of the system in the tax context can occur through regular or one-off surveys on the system conducted for the revenue authority by external agencies and through submissions, reviews and reports from government-appointed entities, parliamentary committees and other external stakeholders. In addition, feedback from taxpayers and other stakeholders (for example, provided through online forms or surveys following parties' participation in ADR programs) can be used to evaluate the system.

In summary, for most of the DSD principles, the provision of examples of the DSD principle applied in the tax dispute resolution context or the provision of additional explanation with respect to the DSD principle applied in the tax context were the only changes made. As shown in Table 6.2 below, the provision of examples of the DSD principle applied in the tax dispute resolution context was made for the majority of the DSD principles. Additional explanation pertaining to the ordering of the procedures from low to high cost in DSD Principle 6 was also provided through including the exceptions of the high upfront costs generally likely to be incurred by taxpayers and that the additional use of ADR can add additional costs at the stage of the formal dispute procedures at which it is utilised. However, the only substantive change to the set of original DSD principles was the change in the wording of DSD Principle 5, which

¹⁴ Slaikeu and Hasson, above n 6, at 77-79.

¹⁵ Australian Taxation Office "Disputes policy" (7 September 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Resolving-disputes/Disputes-policy/>> (last accessed 7 November 2016).

¹⁶ Australian Taxation Office *Dispute management plan 2013-14* (Canberra, January 2014).

¹⁷ HM Revenue and Customs *Resolving tax disputes: Commentary of the litigation and settlement strategy* (November 2013) at Annex 1.

¹⁸ Slaikeu and Hasson, above n 6, at 87.

has been modified to reflect the inclusion of an internal person or unit that acts as a mentor and advisor on ADR techniques for revenue authority staff as opposed to for both disputants in the original context of organisational disputes. Thus, the set of general DSD principles derived from the DSD literature can generally be applied in the tax dispute resolution context without significant substantive modifications being made to the principles.

6.3.2 Derivation of the tax dispute systems design principles

Table 6.2 derives the proposed tax DSD principles (stated in column three) based on the similarities and differences identified in the DSD evaluations in Table 6.1. The modifications, as detailed in section 6.3.1 above, made to the original DSD principles (stated in column one) in order to arrive at the corresponding tax DSD principles, are outlined in column two.

Table 6.2: Dispute Systems Design Principles and the Corresponding Tax Dispute Systems Design Principles

DSD Principle	Modifications	Tax DSD Principle
(1) Stakeholders are included in the design process. Stakeholders should have an active and integral role in creating and renewing the systems they use.	-Examples of stakeholder involvement in the design process in the tax dispute resolution context are provided.	(1) Stakeholders are included in the design process. For example, stakeholders may be involved in revenue authority ADR program pilots and in reviews and consultations on the tax dispute resolution system.
(2) The system has multiple options for addressing conflict including interests, rights and power-based processes. The system should include interests-based processes and low-cost rights and power-based processes should be offered should interests-based processes fail to resolve a dispute.	-Examples of options available for addressing disputes in the tax dispute resolution context are provided. -The availability of interests and rights-based ADR options at the audit and litigation stages is included.	(2) The system has multiple options for addressing conflict including interests, rights and power-based processes. For example, the system's options for addressing conflict may include: direct negotiation, internal review and litigation as well as interests and rights-based ADR options. In addition, interests and rights-based ADR options should also be available at the audit and litigation stages.
(3) The system provides for loops backward and forward. The system should include loop-back mechanisms which allow disputants to return from rights or power-based options back to interest-based options and also loop-forward mechanisms which allow disputants to move directly to a rights or power-based option without first going through all of the earlier interest-based options.	-Examples of loop-back and loop-forward mechanisms in the tax dispute resolution context are provided.	(3) The system provides for loops backward and forward. Loop-back mechanisms allow parties to return from rights or power-based options back to interests-based options and loop-forward mechanisms allow parties to move directly to a rights-based option without having to go through all of the earlier interest-based options. For example, ADR options available at the litigation stage can provide loop-back mechanisms and the ability for taxpayers to by-pass the

DSD Principle	Modifications	Tax DSD Principle
		revenue authority's internal review process can provide a loop-forward mechanism.
<p>(4) There is notification before and feedback after the resolution process. Notification in advance of taking a proposed action affecting others can prevent disputes that arise through misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future.</p>	<p>-Examples of forms of notification and feedback in the tax dispute resolution context are provided.</p>	<p>(4) There is notification before and feedback after the resolution process. Notification in advance of taking a proposed action affecting others can prevent disputes that arise through misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future. For example, in order to prevent disputes from arising, general notification of potential areas for tax disputes can be provided through the revenue authority's compliance activities and campaigns, and through the publication of case notes on court decisions. To prevent similar disputes in the future, feedback on disputes can be provided through the publication of general statistics on dispute matters and through post-dispute analysis and publication of feedback collected from participants in revenue authority ADR programs.</p>

DSD Principle	Modifications	Tax DSD Principle
(5) The system has a person or persons who function as internal independent confidential neutral(s). Disputants should have access to an independent confidential neutral to whom they can go to for coaching, referring and problem-solving.	-Replaced: “person or persons who function as internal independent confidential neutral(s)” with “internal person or unit that functions as a mentor or advisor”; “disputants” with “revenue authority staff”; and “coaching, referring and problem-solving” with “mentoring and advice on ADR techniques” in order to provide greater relevance of this DSD principle in the tax dispute resolution context.	(5) The system has an internal person or unit that functions as a mentor and advisor for revenue authority staff. Revenue authority staff should have access to an internal person or unit to which they can go to for mentoring and advice on ADR techniques.
(6) Procedures are ordered from low to high cost. In order to reduce the costs of handling disputes, the procedures in the system should be arranged in graduated steps in a low to high cost sequence.	-Included the exception in the context of tax dispute resolution that high upfront costs are generally likely to be incurred by taxpayers. -Included the qualification that the use of additional ADR options can add additional costs at the stage of the formal dispute procedures at which they are utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes.	(6) Procedures are ordered from low to high cost. The steps in the formal dispute procedures should be arranged in a low to high cost sequence (notwithstanding that high upfront costs are generally likely to be incurred by taxpayers involved in tax disputes). The use of additional ADR options can also add additional costs at the stage of the formal dispute procedures at which they are utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes.
(7) The system has multiple access points. The system should allow disputants to enter the system through many access points and offer a choice of persons whom system users may approach in the first instance.	-Examples of multiple structural points of access in the tax dispute resolution context are provided. -Examples of different methods of delivering notification of entry to the system are provided.	(7) The system has multiple access points. The system should allow taxpayers to enter the system through many access points, structurally. For example, entry at the level of internal review or entry at the level of external appeal. There should also be a range of

DSD Principle	Modifications	Tax DSD Principle
	<p>-Examples of multiple procedural forms of access to the system such as the provision of forms and guides in different languages and formats, and providing a choice of access persons for taxpayers in particular circumstances to approach, are provided.</p>	<p>methods to deliver notification of entry to the dispute resolution system. For example, by personal delivery, by electronic means of communication or by post. In addition, multiple forms of access to the system should be provided through the provision of forms and guides in different languages and in alternative formats, and a choice of access persons should be available for certain taxpayers to approach (including non-English speaking taxpayers and deaf, hearing-impaired or speech-impaired taxpayers).</p>
<p>(8) The system includes training and education for stakeholders. Training of stakeholders in conflict management as well as education about the dispute system and how to access it are necessary.</p>	<p>-Examples of forms of training and education in the tax dispute resolution context are provided.</p>	<p>(8) The system includes training and education for stakeholders. For example, the general in-house training of revenue authority staff should include a specific component on conflict management and resolution. Revenue authority staff acting as facilitators or mediators should receive specialised training in mediation developed by external ADR specialists. Education about the dispute system can be provided through information about the dispute resolution procedures provided on the revenue authority's website, the publication of guides on the dispute resolution procedures, revenue authority guidelines on the dispute</p>

DSD Principle	Modifications	Tax DSD Principle
		procedures and online learning material for tax agents.
(9) Assistance is offered for choosing the best process. This includes the use of guidelines and/or coordinators and process advisors to ensure the appropriate use of processes.	-Examples of forms of assistance in choosing the best process in the context of tax dispute resolution are provided.	(9) Assistance is offered for choosing the best process. For example, revenue authority guidelines on the dispute resolution procedures in order to assist in the appropriate use of processes, and the existence of a unit within the revenue authority responsible for overseeing (and providing advice on) the ADR programs available. In addition, requests for ADR should be approved by relevant staff from the above unit.
(10) Disputants have the right to choose a preferred process. The best systems are multi-option with disputants selecting the process.	-Replaced “Disputants” with “Taxpayers” to provide greater relevance to the principle in the tax dispute resolution context. -Examples of choosing a preferred process in the context of tax dispute resolution are provided.	(10) Taxpayers have the right to choose a preferred process. Choice of a preferred process may be offered in a number of ways including (but not limited to): taxpayers can choose to have an internal review, appeal externally or do both; the choice for taxpayers to use ADR is made available alongside their existing review and appeal rights; taxpayers can choose to use ADR (if it is appropriate) once a dispute reaches a tribunal or court; and qualifying taxpayers can choose to have matters dealt with in a tribunal or court using small tax case procedures.

DSD Principle	Modifications	Tax DSD Principle
(11) The system is fair and perceived as fair. The system should be fair to parties and foster a culture that welcomes good faith dissent.	-Examples of aspects relevant to the fairness and perceived fairness of the system in the context of tax dispute resolution are provided.	(11) The system is fair and perceived as fair. The dispute resolution system as a whole should be fair and perceived as fair. For example, the internal review function of the revenue authority should be independent from the audit or compliance function. In addition, revenue authority staff acting as facilitators or mediators in ADR programs of the revenue authority should be fair and perceived as fair. For example, revenue authority facilitators or mediators should have had no prior involvement in the particular dispute.
(12) The system is supported by top managers. There should be sincere and visible championship by senior management.	-Replaced “top managers” with “senior revenue authority members” to provide greater relevance to the principle in the tax dispute resolution context. -Examples of championship by senior management in the tax dispute resolution context are provided.	(12) The system is supported by senior revenue authority members. There should be visible evidence of sincere championship of the dispute resolution system and of ADR by senior revenue authority members. For example, through speeches, presentations, media statements or other releases.
(13) The system is aligned with the mission, vision and values of the organisation. The system should be integrated into the organisation and reflect the organisational mission, vision and values.	-Examples of integration of the dispute resolution system in the organisation and alignment of the revenue authority’s dispute resolution approach with the mission, vision and values of the organisation in the tax dispute resolution context are provided.	(13) The system is aligned with the mission, vision and values of the organisation. For example, the dispute resolution system should be integrated into the organisation through the revenue authority’s taxpayers’ charter (or equivalent), and the revenue authority’s approach towards dispute resolution, outlined in its Disputes

DSD Principle	Modifications	Tax DSD Principle
		Policy (or equivalent), should be aligned with its overall mission, vision and values. In addition, the revenue authority's future plans with respect to dispute resolution should feature in its Strategic Plan (or equivalent).
(14) There is evaluation of the system. This acts to identify strengths and weaknesses of design and foster continuous improvement.	-Examples of evaluation of the system in the context of tax dispute resolution are provided.	(14) There is evaluation of the system. For example, evaluation of the tax dispute resolution system can occur through regular or one-off surveys on the system conducted for the revenue authority by external agencies; evaluation can be provided by submissions, reviews and reports from government-appointed entities, parliamentary committees and other external stakeholders; taxpayers can provide general feedback on the system (for evaluation) to the revenue authority, for example, through completing online forms and participants in ADR programs can be invited to provide feedback (for evaluation) at the conclusion of the ADR process.

6.4 Summary

This chapter has compared the DSD evaluations of the four jurisdictions' tax dispute resolution systems and consequently derived a set of best practice tax DSD principles. As indicated in chapters 4 and 5 earlier, when the four jurisdictions' tax dispute systems are compared from a DSD perspective, it appears that the strengths of the dispute resolution systems of the UK and the US lie in particular aspects of DSD relating to the structure of the system. Whereas the strengths of the Australian system mainly lie in aspects relating to the support and championship of the system. However, the NZ system displays some deficiencies in both areas. In addition, common to all four jurisdictions is that there are generally some indications of negative perceptions of fairness of the tax dispute resolution systems from various stakeholders evident.

In deriving the tax DSD principles, modifications have been made to the general DSD principles in order to give them more relevance in the tax dispute resolution context. In most instances, the only modifications made were the provision of examples of the DSD principle applied in the context of tax dispute resolution or the provision of additional details regarding the DSD principle applied in the tax context. Thus, notwithstanding the modifications made to the wording of one DSD principle, the set of general DSD principles derived from the prior literature in chapter 2 of this thesis, can be applied in the tax context without significant substantive modifications.

The only substantive modification made to the set of general DSD principles in the tax dispute resolution context was the changes made to DSD Principle 5. The original DSD principle provides that disputants should have access to an internal independent confidential neutral to whom they can go to for coaching, referring and problem-solving. However, as outlined in section 6.3.1 above, in the context of tax dispute resolution, in practice, internal independent confidential neutrals serving both the revenue authority and taxpayers in dispute, generally do not exist. This is in part due to the fact that tax disputes occur between the revenue authority and an external party (the taxpayer) as opposed to between internal employees in the organisational disputes context. Thus, the provision of an internal independent confidential neutral which disputants can access for coaching, referring and problem-solving in the tax context usually takes the form of an internal person or unit within the revenue authority that can mentor and provide advice to revenue authority staff on dispute resolution and ADR techniques. Generally, (with the exception of the TAS in the IRS), there is no equivalent provision of an internal independent confidential neutral for taxpayers to go to within the revenue authority. Arguably, in the context of tax dispute resolution, it would be reasonable to expect that taxpayers can seek advice on dispute resolution and ADR techniques externally (alongside the seeking of advice on the tax technical matters relating to the dispute from tax lawyers and/or tax accountants). Therefore, the wording of DSD Principle 5 has been modified

to provide that revenue authority staff (as opposed to both parties) should have access to an internal person or unit to which they can go to for mentoring and advice on ADR techniques.

Accordingly, this chapter has outlined the modifications made to the general DSD principles in order to derive a resulting set of tax DSD principles. Chapters 7 and 8, which follow, will report the findings of the feedback sought on the tax DSD principles from the interviews conducted with selected NZ stakeholders and consequently suggest possible modifications to the tax DSD principles.

Chapter 7: Interview Findings: The Tax Dispute Systems Design Principles

7.1 Introduction

This chapter presents the feedback received from the interviews conducted with the selected New Zealand (NZ) stakeholders on the set of tax dispute systems design (DSD) principles in the general context. Based on the interview findings, the next chapter will outline the suggested changes to the tax DSD principles and then present the interview findings on the tax DSD principles in the context of the NZ tax dispute resolution procedures. Accordingly, section 7.2 of this chapter firstly outlines the characteristics of the interview participants. Section 7.3 presents the interview findings on the tax DSD principles, including discussion on the most important principles, least important principles, ranking of the principles, modifications, additions and deletions to the principles, and recognising the different ethnic backgrounds of taxpayers in the principles. Section 7.4 then concludes with a chapter summary.

7.2 Participants' Characteristics

As explained earlier in chapter 3, section 3.6.3, for the tax practitioner and alternative dispute resolution (ADR) practitioner stakeholder groups, notices were initially sent out via emails by the New Zealand Law Society (NZLS), the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and the Association of Dispute Resolvers and the Institute of Arbitrators and Mediators Australia (LEADR & IAMA),¹ seeking interested interview participants. In addition, the NZ Tax Leader of Chartered Accountants Australia and New Zealand (CA-ANZ) emailed a list of 12 selected potential interview participants. A total of 6 participants were recruited from the notices and 4 participants were recruited from the email sent by the NZ Tax Leader of CA-ANZ. Given the low number of responses received to the notices and email sent by the above professional bodies, in order to obtain further participants, the researcher contacted a number of tax practitioners and ADR practitioners who had participated in previous research by the researcher on tax disputes mediation and also conducted searches on the internet for NZ tax practitioners, tax academics, ADR practitioners and ADR academics using Google. Consequently, the majority of the tax practitioners, tax academics, ADR practitioners and ADR academics were recruited by being contacted directly by the researcher.

One Inland Revenue participant was recruited as a result of responding to the notice provided through one of the professional bodies and a further Inland Revenue participant was subsequently recruited on the referral of the first representative. The 2 members of the judiciary were recruited after being emailed directly by the researcher. Ultimately a total of 30 participants voluntarily took part in an interview, consisting of: 13 tax practitioners (made up

¹ As noted in chapter 3, section 3.6.3, at n 30, at the time that the interviews were conducted, LEADR & IAMA was the interim name for the ADR professional body now known as Resolution Institute (effective from 4 September 2015).

of 7 tax lawyers and 6 tax accountants); 3 tax academics; 7 ADR practitioners; 3 ADR academics; 2 Inland Revenue representatives; and 2 members of the judiciary.

Relevant demographic details of the participants, as at the time at which the interviews were conducted, are shown in Table 7.1. The participants comprised of 14 males and 16 females. The tax academics and ADR academics were all university lecturers (2 of the ADR academics also held roles as ADR practitioners). All of the ADR practitioners practised in mediation (with 2 also practising in other dispute resolution areas). The tax practitioners held a range of positions including associate, principal, solicitor, barristers, partners, managers, directors and chief executive officer (CEO). Except for one tax practitioner, all of the tax practitioners and tax academics were members of either NZLS or CA-ANZ. In addition, one of the Inland Revenue representatives was a member of CA-ANZ. Except for the ADR academic, all of the ADR participants were accredited by AMINZ, LEADR & IAMA and/or NZLS.²

Table 7.1: Demographic Details of the Interview Participants

Reference in the Thesis	Gender	Occupation/ Position	Professional Body/ Bodies
Tax Practitioner 1 (Lawyer)	Female	Associate	NZLS
Tax Practitioner 2 (Lawyer)	Female	Principal	NZLS
Tax Practitioner 3 (Lawyer)	Female	Senior Solicitor	NZLS
Tax Practitioner 4 (Lawyer)	Male	Barrister	NZLS
Tax Practitioner 5 (Lawyer)	Female	Team Manager	NZLS
Tax Practitioner 6 (Lawyer)	Male	Partner	NZLS
Tax Practitioner 7 (Lawyer)	Male	Barrister	NZLS
Tax Practitioner 8 (Accountant)	Male	Director	-
Tax Practitioner 9 (Accountant)	Female	Partner	NZLS
Tax Practitioner 10 (Accountant)	Male	Partner	CA-ANZ
Tax Practitioner 11 (Accountant)	Male	CEO	CA-ANZ
Tax Practitioner 12 (Accountant)	Female	Director	NZLS
Tax Practitioner 13 (Accountant)	Male	Senior Tax Manager	CA-ANZ

² Many of the practitioners and academics also belonged to other professional bodies in NZ and overseas (for example, the International Fiscal Association (IFA)). However, the professional bodies listed in Table 7.1 are limited to NZLS, CA-ANZ, AMINZ and LEADR & IAMA, as these were the relevant professional bodies in NZ through which the sample of practitioner and academic participants were initially recruited.

Reference in the Thesis	Gender	Occupation/ Position	Professional Body/ Bodies
Tax Academic 1	Female	Lecturer	CA-ANZ
Tax Academic 2	Male	Lecturer	NZLS
Tax Academic 3	Male	Lecturer	CA-ANZ
ADR Practitioner 1	Female	Mediator	AMINZ, LEADR & IAMA, NZLS
ADR Practitioner 2	Female	Mediator	LEADR & IAMA
ADR Practitioner 3	Female	Mediation Advisor	LEADR & IAMA
ADR Practitioner 4	Female	Mediator	AMINZ
ADR Practitioner 5	Male	Barrister, Arbitrator, Mediator and Adjudicator	AMINZ, LEADR & IAMA, NZLS
ADR Practitioner 6	Male	Arbitrator, Mediator and Adjudicator	AMINZ, LEADR & IAMA
ADR Practitioner 7	Female	Mediator	AMINZ
ADR Academic 1	Male	Lecturer	-
ADR Academic/Practitioner 1	Female	Lecturer and Mediator	AMINZ
ADR Academic/Practitioner 2	Female	Lecturer, Mediator, Barrister and Solicitor	LEADR & IAMA, NZLS
Inland Revenue Representative 1	Male	Director	CA-ANZ
Inland Revenue Representative 2	Female	Policy Manager	-
Member of the Judiciary 1	Male	Judge	-
Member of the Judiciary 2	Female	Judge	-

As stated in chapter 3, section 3.6.4 of this thesis, the interview participants who had expressed an interest in participating in an interview were contacted by email by the researcher to arrange a suitable date and time for the telephone interview. However, due to the nature of the participants' occupations, they were typically time pressured and many of them had to reschedule their interviews for a different day and/or time. Despite the time pressures, most of the participants appeared willing to participate and provide their views. With the exception of three participants, all of the participants had read through the supplementary information document and interview guide questions prior to the interview and were thus, relatively prepared for the interview.

As outlined in chapter 3, section 3.6.3 (and as indicated in Table 7.1 above), the interview participants came from six stakeholder groups of interest: tax practitioners, tax academics, ADR practitioners, ADR academics, Inland Revenue representatives and members of the judiciary. While there were some areas in the analysis where there was a difference in views,

particularly between the tax stakeholder groups and the ADR stakeholder groups, there appeared to be no significant differences in the views of the practitioners and the academics within these groups. Therefore, in the data analysis and interview findings which follow, unless otherwise stated, the tax practitioners and tax academics have been combined together and referred to as ‘tax participants’ and the ADR practitioners and ADR academics have been combined together and referred to as ‘ADR participants’. In addition, as noted in chapter 3, section 3.6.3 of this thesis, within the tax practitioner group of stakeholders, there appeared to be no significant difference in views between the tax lawyers and tax accountants. Thus, a distinction between them has also not been made in the data analysis and interview findings. However, the fact that there were no noticeable differences in the views found between the academics and practitioners, and between the tax lawyers and tax accountants, may partly be due to the small number of participants that were willing and able to participate in the interviews overall. The above observations were noted in the researcher’s own analysis of the interview findings as qualitative data analysis software was not utilised in this study.

7.3 Data Analysis and Interview Findings – The Tax Dispute Systems Design Principles

7.3.1 General comments

A number of general comments were made by the interview participants in relation to the interview questions and the general nature of the tax DSD topic. In particular, some of the tax participants and the members of the judiciary were surprised by the structure and nature of the questions asked, and also by the overall concept of applying DSD principles within the design of tax dispute resolution systems:

I guess I would say for me, rather than thinking in terms of principles I would think it is better to think in terms of a specific design ... I would find that more tangible.
(Tax Practitioner 4)

I was a little bit surprised by the nature of the questions that you were asking in terms of, like, ranking the principles and very specific questions. I would have thought that this is the type of study which would’ve [lent] more to having an open interview.
(Tax Practitioner 6)

... [C]an I just say as a preface to that, that the questions are at a sort of a general level that I find quite difficult to deal with very easily in the terms you’ve asked them.
(Member of the Judiciary 1)

I’m happy to go through them [but] I must admit I’m not [the] sort of [person] for this sort of structured approach.
(Member of the Judiciary 2)

In addition, a number of participants felt that they were unable to answer certain questions due to their lack of qualifications and/or experience in either the tax or DSD area. Although, this appeared to be most common amongst the ADR participants:

All I need to say really is that I'm coming from outside of experience of the taxation system, so that's limiting what I can say.

(ADR Practitioner 4)

I hate to be unhelpful, but it is presumptuous of me to say 'look, I think this is out of place' in the context of a set of disputes I really don't understand a great deal about.

(ADR Practitioner 5)

I'm not really qualified to answer that question. I haven't studied the DSD principles before ... so I'm not really qualified to comment on which of those principles require modification. It is not my area of specialty. I operate within the practice of tax disputes resolution systems as opposed to any design aspects or any knowledge of conflict resolution systems.

(Tax Practitioner 6)

The views of the two members of the judiciary unsurprisingly lent towards a rights-based approach to dispute resolution, as indicated by the following comments made by one member:

... [W]hat I didn't like very much is the suggestions that ADR should involve negotiating or settling around interests as opposed to rights ... it's not a sort of hard and fast objection, but at least in my professional lifetime the general proposition has been that disputes with tax authorities should be decided in accordance with the law.

(Member of the Judiciary 1)

...[T]he fundamental problem is that by and large, the Department, and I think basically rightly, are looking for a rights-based determination process and probably would resist, and again I think rightly, procedures that deviate from that.

(Member of the Judiciary 1)

Furthermore, the current knowledge and experiences of the members of the judiciary with tax disputes (and the existing NZ tax dispute resolution system) were largely limited to the small subset of disputes which they heard in their particular jurisdiction of the NZ court system. Moreover, this particular subset of disputes may not necessarily have comprised of disputes deemed appropriate for interests-based resolution:

Because as I say, I just don't see enough disputes to get a handle on it. I mean, the fact is that the cases that have come to the courts in recent times have ... in fact almost always

have been won by the IRD. So I'm just seeing a particular, a very small, subset of the disputes.

(Member of the Judiciary 1)

Another comment which was made by the majority of the ADR participants was that the preferred term for 'ADR' was now 'Dispute Resolution' or 'DR':

There is a general philosophy coming through ... with the term ADR and I don't agree with that term, I think that this kind of dispute resolution is the standard approach and other systems outside it are the ADR.

(ADR Practitioner 4)

I tend not to use ADR as an acronym ... I mean it's just dispute resolution. Every process has an alternative to another.

(ADR Practitioner 6)

[W]e really don't talk about ADR anymore. The word 'alternative' really has dropped away, so you just need to talk about 'dispute resolution' ... the people who are in that subject area would very rarely talk now about 'alternative' because we don't see it as alternative.

(ADR Academic/Practitioner 1)

However, as noted in chapter 2, section 2.2.3 of this thesis, the term ADR is used in this study given that in the tax dispute resolution context, ADR processes currently remain as 'alternative' dispute resolution processes.

7.3.2 Most important dispute systems design principles

Table 7.2 shows the frequencies of the tax DSD principles that were regarded as the most important by the interview participants.

Table 7.2: Most Important Dispute Systems Design Principles

DSD Principle	ADR Participants	Tax Participants	Inland Revenue Representatives	Members of the Judiciary	Total³
1	2	2	1		5
2	1	4		1	6
3		2		1	3
4					
5					
6		1			1
7				1	1
8	2		1		3
9	1		1		2
10	1	3		1	5
11	5	10	2	1	18
12					
13					
14		1			1

The majority (18) of the interview participants identified DSD Principle 11, the system is fair and perceived as fair, as the most important principle. Most of the participants regarded Principle 11 as the overarching principle:

I thought that the single most important element is your 11. That is to say that the system must be fair and perceived as fair. I think that without that no system would have any credibility.

(ADR Practitioner 5)

If you haven't got 11 ... as your starting point, then there is little or no point in proceeding any further.

(ADR Practitioner 6)

That's a rather overarching principle, but I think it is the most important. So any system regardless of which principles are adopted must be, and be seen to be, fair.

(Tax Academic 2)

I think fairness is absolutely essential and I know that ... some of the principles that you have are focused on that fairness. There's the idea of sufficient knowledge, sufficient

³ Some of the interview participants suggested more than one most important DSD principle. Therefore, the sum of the 'Total' column is greater than the total number of participants interviewed.

training, stakeholder engagement, all of those things coming through which could contribute to a fair system.

(Tax Academic 3)

Many of the interview participants felt that the fairness principle was important in achieving buy-in and participation from users of the dispute resolution system in the first instance:

The people who are using it need to feel that the process is fair otherwise they will push back against the process and it won't have the outcome that you want.

(ADR Practitioner 2)

The reason why I thought this was the most important one is because I kind of consider it a necessary condition for any kind or type of dispute resolution system, is that the system is perceived as fair. Because if that principle is not achieved you don't get any buy-in from the customers of that system.

(ADR Academic 1)

[U]nless you have got something that people actually believe in, especially from a taxpayer's perspective, that they actually believe is going to add value and is not biased before they start ... then there is not going to be any point in entering into any of these [procedures]. Equally, if you have got a revenue authority that doesn't have buy-in as well, you are going to have problems with administering it.

(Tax Practitioner 12)

The thing is that if people do not perceive fairness in the system they are not going to participate in any dispute resolution or actively participate in paying taxes.

(Tax Academic 1)

Well, I guess fairness I think is going to lead not only to a suitable outcome in any dispute, but I think it is going to influence peoples' interests in participating in the process. Just the integrity of the process as a whole and because of peoples' perceptions ... that they believe it will work.

(Inland Revenue Representative 1)

Well, I think unless it is [fair and perceived as fair], there won't be any buy-in. I mean it's fundamental, it's a prerequisite.

(Member of the Judiciary 1)

The tax participants also felt that fairness and perceptions of fairness were vital to the overall integrity of the tax system. This is consistent with the sentiment highlighted by NZ tax

commentators that “when taxpayers lose faith in the fairness and integrity of [the dispute resolution] procedures, the operation of the entire tax regime is called into question”:⁴

I thought that the system is fair and perceived as fair is the most important aspect and that’s probably because we operate within a self-assessment tax system and if the users of the dispute resolution system did not perceive that the system would be fair, then I think it would have a significant negative effect on tax compliance in the first place.

(Tax Practitioner 6)

I think because the fair determination of taxpayers’ rights and liabilities is sort of inherent, or fundamental to the system, really.

(Tax Practitioner 7)

Because if [the tax dispute resolution system] is not perceived as fair then it brings the tax system into disrepute.

(Tax Practitioner 10)

The system has not only got to be fair, but be perceived to be fair ... there [are] a number of quotes which I have seen from other commentators ... which basically say that *the resolution of disputes for tax is vital to the integrity of the tax system because if taxpayers don’t believe that there is a fair system to resolve disputes then in effect they are deprived of justice* ... and as a country dedicated to the rule of law, a fair justice system is vital.

(Tax Academic 2) (emphasis added)

When probed further with respect to whether the interview participants regarded fairness as being important in terms of fairness of the substantive outcome of the dispute or fairness of the procedure for resolving the dispute, most participants felt that procedural fairness was important, as explained in the following comments:

I do think that good process is more important than outcome because different people need different things ... for some people what happens at the end is far less important than how it’s done.

(ADR Practitioner 2)

Procedural fairness is paramount because you might have an outcome that is perceived as unfair by one party, but so long as the process itself that has resulted in that outcome is perceived as fair, then I think you will have a higher level of satisfaction.

(ADR Practitioner 6)

⁴ Mark Keating and Michael Lennard “Developments in tax disputes – Another step backwards?” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Auckland, 11-12 November 2011) at 3.

So for me, that first principle [Principle 11] ... it isn't just about the substantive outcome ... So a lot of stuff that costs no money to people is still really valuable to people, so you can come away with the money and still feel like you've been trashed ... and you could come away with very little in the way of a material outcome and still feel better for it.
(ADR Academic/Practitioner 1)

I just think that it's probably a fundamental of any system design, but particularly when you are talking about a regulator and one where there is generally a power imbalance in terms of the regulator often has much greater resources than the taxpayer ... so people have to perceive the entire tax system as fair, but even when you within that system, when you have a dispute, *it's really important that the process by which that dispute will be undertaken, it is essential that is perceived as being fair.*
(Tax Practitioner 11) (emphasis added)

As illustrated in Table 7.2, other principles which the interview participants regarded as most important included DSD Principles 1, 2 and 10. Similar to the fairness principle, DSD Principle 1, stakeholders are included in the design process, was considered important in achieving stakeholder buy-in to the tax dispute resolution procedures. DSD Principles 2 and 10 (offering multiple options and the right to choose a preferred process) were regarded as important in providing taxpayers with buy-in as well as choice and flexibility in addressing conflict. This was particularly the case for the tax participants given their views that the statutory tax dispute resolution procedures in NZ currently provides taxpayers with limited options to choose from in resolving a dispute:

Consultation with taxpayers and other stakeholders is the only way to get buy-in to the process, to trust it, to participate fully in it. Until that happens, the system will fail.
(ADR Practitioner 1)

I certainly think number 1 is of high importance ... and the reason that I think it is most important is that the people who are affected by any process have had an insight into what works for them. I also think number 2, [which] is simply about creating choice, because I believe in creating choice for people and so that there is flexibility to suit both the people and their situation.
(ADR Practitioner 4)

The first two I think are really important, that stakeholders are included in the pilot programs and I guess, the design of the process itself ... so when I'm saying that, I mean the taxpayer, community and tax advisors, so *I think that's really important just to get their buy-in* and also it sort of fits in with some of the other principles that you've got, [like] the perception of fairness of the system ... The other one that I thought was important, and its number 2 on that list, the system has multiple options for addressing conflict, and that's

probably because I just think *one size doesn't fit all and that's a difficulty perhaps with the system at the moment.*

(Tax Practitioner 5) (emphasis added)

[Principle] 2 would be the most important in that it is important to have various ways of addressing conflict as not all conflict is the same.

(ADR Practitioner 3)

I think that one of the most important things is the taxpayer's right to choose the preferred process. I also think that the loops backwards and forwards is an important point and the multiple options ... *because in my experience the major difficulty we have with tax disputes is the lack of flexibility in the process*, so at no point other than at the time that a matter goes to court [does] the taxpayer [have] the right to consult with an external alternative dispute resolution specialist of any kind or some sort of mediator, so I find that that can be relatively oppressive in some respects.

(Tax Practitioner 9) (emphasis added)

The one that I would think would be important is that the taxpayers have the right to choose the preferred process, and then again that just really goes into *getting the buy-in from the taxpayers* and into the whole system and making them feel that it has actually been a worthwhile process and *making sure that it is the right fit for them* and for the type of dispute that they have.

(Tax Practitioner 5) (emphasis added)

For one of the members of the judiciary, the DSD principles concerning taxpayer choice and control over the process were regarded as the most important. They were particularly regarded as important in order to provide taxpayers with the ability to get out of the dispute resolution process at any stage and go to the courts:

... [I]n terms of the importance of the principles ... *I think I just said that the ability to get out of the process at any point and get to court*, and that runs through a number of them ... And just the ability for the taxpayer to have some control over the process and deciding what it is rather than having it imposed as a one-size-fits-all.

(Member of the Judiciary 2) (emphasis added)

Notwithstanding that they did not rank taxpayer choice as the most important principle, the other member of the judiciary also reiterated the view that taxpayers should be able to insist the immediate resolution of their disputes by the courts:

I agree that taxpayers should have a right to choose a preferred process. I think basically the default should be that they can challenge a decision in the courts or the [Taxation] Review Authority if they want to.

(Member of the Judiciary 1)

7.3.3 Least important dispute systems design principles

Table 7.3 shows the frequencies of the tax DSD principles that were regarded as the least important by the interview participants.

Table 7.3: Least Important Dispute Systems Design Principles

DSD Principle	ADR Participants	Tax Participants	Inland Revenue Representatives	Members of the Judiciary	Total⁵
1		2		1	3
2	1				1
3		1			1
4		1			1
5	1	1			2
6	2	2			4
7		1			1
8		1		1	2
9		1		1	2
10					
11					
12	3	4			7
13	3	4	1		8
14		2			2
Participant unable to specify	2	1	1		4

As indicated in Table 7.3, the DSD principles most frequently regarded by the interview participants as least important were DSD Principles 13 (8 participants) and 12 (7 participants). Participants viewed these as principles as ones which only concerned the revenue authority's internal processes. It was thought that the aspects of the alignment of the dispute resolution system with the mission, vision and values of the organisation (DSD Principle 13) and support for the system by senior revenue authority members (DSD Principle 12) were features that "ran independently" of the dispute resolution system as opposed to being deliberate design features per se. Moreover, it was generally expected that aspects such as support for the system would take place following the implementation of a dispute resolution system, anyways:

The system is being aligned with the mission, vision and values of the organisation ... I think that is a *one-sided concern and it only concerns the revenue authority's internal*

⁵ Some of the interview participants suggested more than one least important DSD principle. Therefore, the sum of the 'Total' column is not equal to the total number of participants interviewed.

process which ... I mean, it depends who would be seeing this. But from the point of view of the ADR professional ... while it is important, I think it is probably less important than some of the other things there.

(ADR Practitioner 1) (emphasis added)

If a dispute resolution system for tax disputes is installed, this [support for the system] should run independently of it. Whether people within the IRD support it or not, it should be independent. Whether they like it or not, it should already be there.

(ADR Academic 1)

I thought generally, and it's not because it's not important, but it's just not the most important, is that there needed to be championship by senior revenue authority members to the system ... I thought that *if you had a good system, if it's designed well, then that would follow anyway* and I just think that wasn't the most important thing.

(Tax Practitioner 1) (emphasis added)

The ... ones, I guess, I think I probably had down the bottom of the ranking system were 12 and 13. Although, those things are important I sort of thought well, that was just a given that those things would happen anyway, so that's the reason why I ranked them lower.

(Tax Practitioner 5)

DSD Principle 13 was generally regarded as the least important principle (by 8 participants) on the basis that, depending on what the mission, vision and values of the organisation were, in certain circumstances it may not be appropriate to design the dispute resolution system to align with them. The organisation's mission, vision and values could also potentially change over time:

So my number 14 is your number 13, the system is aligned with the mission, values and vision of the organisation. But of course if the mission and values of the organisation are crap then you don't really want a dispute resolution system designed in alignment with them.

(ADR Academic/Practitioner 1)

I probably only identified one that I put right at the bottom and that was number 13, linking to the mission, vision and values of the organisation. Not because I think they're going to be rubbish or anything like that, but it did kind of trouble me in the sense that *there is a lot of other things that might get written into the mission of a revenue authority ... and disputes in theory should only be a tiny proportion of what the revenue authority deals with and so to have a direct linkage, I think could distort things a little bit.*

(Inland Revenue Representative 1) (emphasis added)

I think that probably 13, it's an awkward one to say, simply because I think sometimes the values and the mission of the organisation change and I would like to think that the values around dispute resolution can withstand all of that.

(ADR Practitioner 4)

Furthermore, in the context of the NZ tax dispute resolution procedures, one interview participant was sceptical as to whether the application of DSD Principle 13 would actually make any difference to the dispute resolution system:

I thought that probably the least important of those principles was principle number 13, that the system is aligned with the mission, vision and values of the organisation ... in terms of Inland Revenue ... *I doubt that whether putting something in terms of an internal mission statement or charter is actually going to seriously filter through and affect the manner in which the people involved in that system at the grassroots level are actually going to exercise or how they exercise their various judgement and skills, and discretion within that system.* I think that's probably not going to make any difference at all.

(Tax Practitioner 6) (emphasis added)

As noted above, DSD Principle 12 was regarded as the least important principle (by 7 participants) as it was expected that support for the disputes system would generally follow once the system was in place:

I'm not suggesting it's not a desirable thing but ... once you have created a dispute system, the authorities will be stuck with it, they will have to apply it and so I guess I didn't think that was so important because I think that must follow.

(ADR Practitioner 5)

In addition, against the background of the NZ tax dispute resolution procedures, a number of the tax participants indicated that the support of the system by senior revenue authority members was not necessarily forthcoming in practice:

I suppose you need the support of senior revenue members. But the fact is that often they ... you know, they have their own agendas.

(Tax Practitioner 3)

In terms of senior revenue authority members' support of the system ... if I've got a criticism of the IRD and their advisors or their litigators, I perceive elements of 'win at all costs' ... and sometimes that is done at the cost to the wider tax system. *I've seen it done where I think the IRD have walked away from their principles* and I've seen it done where they have argued differently to what their stated policy is.

(Tax Practitioner 11) (emphasis added)

Four interview participants regarded DSD Principle 6, the procedures are ordered from low to high cost, as the least important principle. One ADR participant was of the view that a low cost process was not necessarily the most effective process if it was designed solely based on achieving the aim of low costs:

Obviously being cost effective is a good thing but if the other stuff isn't in place and you've just got a low cost process, then the low cost process is less likely to work. I guess that's why I put it last.

(ADR Practitioner 2)

Whereas a number of the tax participants regarded DSD Principle 6 as the least important as they felt that in practice the resolution of tax disputes was issue-based and all disputes, regardless of their value, had to follow through a sequential process:

Well, I'm not saying that it's not an important factor but I think it would be difficult to design a whole process around cost because if you're in a tax dispute, it tends to be an issue-based thing ... *I mean you can have a legal issue that isn't worth a lot of money but might cost you just as much as a legal issue that is worth a lot of money to actually dispute because you got have the same things you have to do.* You have got to do your research, do your statutory interpretation, you know all that sort of thing. It tends to be an issue-based thing.

(Tax Practitioner 9) (emphasis added)

I think probably the procedures are ordered from low to high cost [is the least important] ... just because I think in the small and medium entity environment that I deal with, that once you enter into a dispute with the IRD it is very hard to tell which costs are higher and which costs are lower ... *because it's just a sequential process that you have to follow through.*

(Tax Practitioner 13) (emphasis added)

Although, as noted earlier in chapter 6, section 6.3, included in DSD Principle 6 is the statement that generally high upfront costs may be incurred by taxpayers in working out their positions at the outset of the dispute. These upfront costs may include the time spent by the taxpayer in preparing for and participating in negotiations, as well as the cost of professional advisors. Arguably, these upfront costs must necessarily be incurred in order for taxpayers (particularly those who are self-represented) to follow through the “sequential process” of the procedures.

Four participants were unable to specify a least important principle on the basis that they either preferred not to provide a ranking of the 14 DSD principles or were unable to provide a full ranking of the 14 principles, as discussed in section 7.3.4 which follows.

7.3.4 Ranking of the dispute systems design principles

Seventeen of the participants were able to fully rank the 14 DSD principles in order of importance from highest to lowest. Eleven participants were unable to rank (or fully rank) the principles for various reasons, including that they felt that ranking the principles was not appropriate as all of them were required in a dispute resolution system. Some participants also felt unable to rank them as they regarded many of the principles as equally important. The above difficulties in ranking the principles were not confined to any one particular stakeholder group (that is, the ADR participants, the tax participants or the Inland Revenue representatives). It should be noted that, the two members of the judiciary were not asked to rank the DSD principles.

I don't think you can rank them. Apart from the system has multiple options for addressing conflict because that's your kind of big overview thing where you're starting to develop the system and then under that, when you've got the system itself, then the rest of the things that you've got listed there should be all part of it.

(ADR Practitioner 3)

Well I don't think any are least important ... and I don't think you can rank them 1 to 14 because, at least in my experience, they sit in separate discrete categories and you don't get to the last one if you don't have the first one.

(ADR Practitioner 6)

I just in some ways felt that many of the principles I felt were quite important and quite good principles so kind of having to rank them all was a little bit arbitrary.

(ADR Academic 1)

It's hard for me to rank them and I'd almost prefer not to because I'm not sure it is appropriate for some of them to be less important than the others, you know I think one should try very hard to make space for all of them.

(Tax Practitioner 8)

Well it's very hard to do because I've tried to give you the three most important and the two that I consider least important. The other ones are really various aspects of or different parts to the system and I kind of feel they are all of equal merit ... I find it difficult to give a numeric 1, 2, 3, 4, 5, etcetera to the various options because many of them are equally important.

(Tax Academic 2)

Furthermore, some participants found it difficult to rank the principles as they believed that the principles could be separated into two different categories. Broadly, the two categories related to principles on "how the system worked" and principles which "made the system work":

I think on my reading ... they seem to fit into two categories. One is about the principles for making the principles about how the system works within it ... and then the other sort of broad category are things that I think will make the system work ... So in terms of which are the most important, they all are. It depends on which category you are looking for.
(ADR Academic/Practitioner 2)

I'm uncertain whether all of these principles are in fact principles or whether they are merely implementation issues with other principles ... I think 7 and 10 are genuine principles, but 8 and 9 are implementing those principles.
(Tax Academic 2)

Of the 11 participants who were unable to rank (or fully rank) the principles numerically from 1 to 14, 5 participants provided no ranking at all, 1 participant provided a partially complete ranking and 4 participants grouped or "clustered" the principles into various categories or tiers of importance, for example, 'high, medium and low' or 'important and less important' principles:

... [T]hat's what I tried to do and I'm sorry I had to group them. I couldn't do them 1 to 14 so I've tried to give them a high, middle and lower ranking.
(ADR Practitioner 4)

Well I'm going to be really unhelpful here and suggest that I had trouble listing them in terms of sequence ... What I found, and maybe I'm misunderstanding some of them, [was that] I tended to put them slightly in clusters.
(Tax Academic 3)

The remaining participant (of the 11) grouped the principles according to four distinct categories: high-level purposive principles, dispute avoidance principles, dispute process delivery principles and dispute process administration principles. These categories essentially provide an extension of the above categorisation of principles on how the system worked (dispute process delivery principles) and principles which made the system work (dispute process administration principles). The ADR practitioner further noted that the high-level purposive principles were necessary in order for the other principles to follow:

They [the high-level purposive principles] are completely different to the delivery or administrative principles that follow. So if you haven't got those items to start with, if you haven't got 11, 12 and 13 as your starting point, then there is little or no point in proceeding any further.
(ADR Practitioner 6)

Two of the academic participants also suggested that providing some form of categorisation of the principles was potentially more helpful than giving a precise ranking of the principles:

... [B]ut I did want to make the observation that ranking those principles in the way that you've suggested felt pretty artificial to me and ... I probably would [recommend] looking at core functions, core principles and discretionary principles, or essential and non-essential. *Some sort of larger category rather than suggesting that sort of precise ranking.* (ADR Academic/Practitioner 1) (emphasis added)

I think you may be able to group some of these principles. So rather than ending up with, at the moment you've got 14, you may end up I think with 5 or 6, with sub-headings underneath ... So I think maybe they need to be ... collated.
(Tax Academic 3)

Of the participants that fully ranked the 14 DSD principles, a range of different rankings were provided. However, by way of general observation across the rankings provided, the principles regarding fairness, taxpayer choice and stakeholder involvement in the design process were typically ranked highest (for example, DSD Principles, 11, 1, 2, 3 and 10). These were generally followed by those principles relating to taxpayer assistance and education (for example, DSD Principles 8 and 9) and the principles relating to the revenue authority and its staff members were generally ranked as least important (for example, DSD Principles 5, 12 and 13). Notably, this general pattern was specifically summarised by two of the interview participants:

... [A]t the beginning [the] priorities [which] I focused on [were] the users of the processes, then the middle bit is focused on the process itself ... and now we are getting to the bit that really focuses more on the organisation, and so if you can see a pattern in my prioritising, it's in the end to put the user first and the organisation last.
(ADR Academic/Practitioner 1)

It is more concentrating on the involvement of the taxpayers and those things about assistance, fairness, multiple entry points, and then seen as less important overall ... the system being supported and aligning with the mission. And in the middle, the 'nuts and bolts' things like evaluation, notification and [having an] internal mentor.
(ADR Practitioner 1)

With one exception, there appears to be no marked differences in the rankings provided across the different stakeholder groups interviewed. The exception being that there was a notable difference in the rankings provided by the ADR participants and by the tax and Inland Revenue participants with respect to DSD Principle 6, the procedures are ordered from low to high cost. The ADR participants ranked DSD Principle 6 as being of low importance (ranked as the twelfth, thirteenth or fourteenth principle). In contrast, the rankings provided by the tax and Inland Revenue participants were mixed between low (ranked as the twelfth, thirteenth or fourteenth principle) and high importance (ranked as the first or second principle). A higher ranking may possibly have been given to DSD Principle 6 by some of the tax and Inland

Revenue participants due to their knowledge and/or experience with the costs associated with the current NZ tax dispute resolution system resulting in the ‘burning off’ taxpayers:

I guess I keep thinking about the process we have at the moment ... the process which we have at the moment is, to me it is incredibly unfair and it results in really high costs early on and ongoing high costs all the way through the process.

(Tax Practitioner 4)

... [O]ne of the ongoing criticisms that the Department receives about the process is what they call ‘burn off’. *So you don’t want to have taxpayers in a situation where they believe they are correct and that an independent evaluation may even ultimately prove that they are correct, but they are burnt off by the system because of high cost.* So you want costs to be sort of at the much later stages, where it’s sort of a little bit clearer about ... which decision is sustainable and/or correct.

(Inland Revenue Representative 2) (emphasis added)

Linking the findings in this section back to the comparisons of the DSD evaluations of the four jurisdictions drawn earlier in chapter 6, section 6.2.5, it can be seen that the tax dispute resolution systems in the United Kingdom (UK) and the United States (US) meet a number of the DSD principles which the interview participants ranked as being of higher importance (for example, DSD Principles 2, 3 and 10) with multiple options, multiple structural access points and loop forward procedures. On the other hand, Australia meets many of the lower ranked principles (for example, DSD Principles 12 and 13) with support from senior revenue authority members and alignment of the system with the mission, vision and values of the organisation. The NZ tax dispute resolution system displays some deficiencies in both the higher and lower ranked principles (for example, DSD Principles 10, 12 and 13). In addition, the DSD evaluations generally found that the design of the tax dispute resolution systems in all four jurisdictions could be improved with respect to the highest ranked principle of fairness.

7.3.5 Suggested modifications to the dispute systems design principles

Table 7.4 shows the frequencies for each of the tax DSD principles for which the interview participants suggested modifications.

Table 7.4: Suggested Modifications to the Dispute Systems Design Principles

DSD Principle	ADR Participants	Tax Participants	Inland Revenue Representatives	Members of the Judiciary	Total⁶
1					
2	1	2		1	3
3	1	1			2
4		1			1
5	1	2			3
6		3			3
7	1	2			3
8	3	3			6
9		2			2
10	1	1			2
11	3	4			7
12	1	2			3
13		1			1
14		1			1
No Modifications	4	10	2	1	17

7.3.5.1 Suggested modifications to principles 11 and 8

As indicated in Table 7.4, the majority of the interview participants (17) suggested no modifications to the set of DSD principles. The most frequent modifications suggested by the interview participants were to DSD Principles 11 and 8, with 7 participants suggesting that DSD Principle 11 could be modified and 6 participants suggesting that DSD Principle 8 could be modified. The main concern was that DSD Principles 11 and 8 indicated that the facilitator or mediator was a revenue authority member of staff:

There's an assumption there really that revenue authority staff are to act as facilitators or mediators. *Well they shouldn't be acting as facilitators or mediators because if they do you have immediately lost the perception of fairness. There is no way that 11 can be consistent with 8 if you have internal staff performing that task.* They must be seen as independent ... Take out the revenue authority staff acting as anything that purports to be independent because you can't be a facilitator or mediator, ever, if you are employed by one side.
(ADR Practitioner 1) (emphasis added)

⁶ Some of the interview participants suggested more than one modification. Therefore, the sum of the 'Total' column is not equal to the total number of participants interviewed.

The principles seem to reflect a process that is internal rather than external and ... right from the outset it is going to be inherently difficult to persuade parties that it is fair ... *As long as you provide them internally you will be hitting your head against a brick wall if you think you are going to persuade users of the service that it is fair and independent.* Yeah, it's a perception thing. I don't think consumers could come to any other conclusion other than it lacks independence and impartiality.

(ADR Practitioner 6) (emphasis added)

Principle number 11, about the fairness ... my understanding is that currently the facilitator is somebody who is from IRD or that the conference is convened by a[n] IRD person and that may be a problem for the perceived fairness of the system because of the third party.

(ADR Academic 1)

In point 11, revenue authority facilitators or mediators should have no prior involvement in the particular dispute. I think the question is broader than that. *Even if they haven't been involved in that dispute, they have been involved in other disputes arguing from the IRD's point of view ...* is that Chinese wall sufficient to make them independent and impartial?

(Tax Academic 3) (emphasis added)

Accordingly, some of the interview participants were asked for their views on whether they thought that the facilitator or mediator should be a revenue authority member of staff. All of the ADR participants that were asked this thought that the facilitator or mediator should be an independent external mediator trained in mediation (who subsequently received some training in tax). These findings align with prior studies conducted in NZ and Australia on the use of mediation in tax dispute resolution.⁷

If a dispute comes to a say, facilitation conference, the facilitator should clearly be an impartial person. So that person should not have any interest in the dispute itself and *the facilitator should probably be somebody who is not employed by IRD. Ideally they should be a trained mediator* and that person should come the process in an impartial way and not participate with any of the other parties.

(ADR Academic 1) (emphasis added)

So, I've got some comments about the use of internal mediators in saying that there is over time the risk of bias when you have someone who is from the inside out and ... *so that for me supports the idea of considering the use of external panel mediators who do other work*

⁷ See Melinda Jone and Andrew J Maples "Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime" (2013) 19 NZJTL 301 at 314, which finds that the most important aspect of a tax mediation regime for NZ is the inclusion of a mediator who is independent of both parties and furthermore, that the mediator is foremostly trained and qualified in mediation as opposed to being a specialist in tax law; and Melinda Jone and Andrew J Maples "Mediation as an alternative option in Australia's tax disputes resolution process" (2012) 27(3) ATF 527 at 559-560, which similarly makes a recommendation in Australia for the appointment of mediators independent of the Australian Taxation Office (ATO) who are primarily skilled in (facilitative) mediation.

as well ... it would be important for them to get external supervision and I think for them to have some variety of work which would avoid that bias and assumptions and kind of weariness thing.

(ADR Practitioner 2) (emphasis added)

Now, I see that you had intended ... to have IRD, tax people ... subsequently trained in ADR, whereas *I have always worked in the reverse situation where they use only experienced ADR professionals with multiple sources of training and then upskill them in the various disciplines that they are required to be working in* and I believe that that is the best way round ... Because the training that I'm talking about, the level of training required for an ADR professional is not like a part time job, you know, it's someone who's got multiple disciplines and multiple trainings.

(ADR Practitioner 7) (emphasis added)

Most of the tax participants that were asked also thought that the facilitator or mediator should be an independent external person who was trained in mediation. However, as indicated by some of the responses given below, it is unclear as to whether the tax participants thought that the independent external person should be a trained mediator who subsequently received training in tax or foremostly a tax specialist who subsequently received training in mediation:

I actually think that if you are going to have mediators, in particular, *they should be independent and they should be qualified in mediation and they should have no part in the disputes process*, because the problem that we have currently ... is that most of the current facilitators are people who have been in the Department for a very long time and they have a particular mind set which impacts on their impartiality.

(Tax Practitioner 2) (emphasis added)

You have got here, number 8, that they have revenue staff acting as facilitators or mediators, I think that ... in this process *it would be good to have like someone that didn't work for Inland Revenue that was a mediator or a facilitator*. In fact, I think that it is important. I went to a facilitated conference recently and ... all the facilitators at the conferences for Inland Revenue are Inland Revenue staff and of course, you know, they are going to be thinking of the Inland Revenue principles and so they are not as open minded.

(Tax Practitioner 3) (emphasis added)

I think it would be better if it was someone ... independent like a mediator.

(Tax Practitioner 4)

I really, really would like to see the option of external conference facilitators, in other words, ones that are not with the Inland Revenue itself.

(Tax Practitioner 9)

... [T]he system has training and education for stakeholders, it has got there 'revenue authority staff acting as facilitators or mediators'. I personally don't think any revenue authority staff should be acting as mediators. I think it should be someone independent.
(Tax Practitioner 12)

On the other hand, a small number of the tax participants and the two Inland Revenue representatives thought that the role of the facilitator or mediator could be performed by an internal independent revenue authority member of staff. These participants thought that Inland Revenue facilitators potentially could have a more persuasive influence over the Inland Revenue staff members involved in the dispute and moreover, they believed that the in-depth tax knowledge of the Inland Revenue facilitator was necessary:

I actually think [having Inland Revenue facilitators] is an advantage sometimes because I think that quite often they have more influence over the Inland Revenue staff members than an external party would have. A more positive influence, so more persuasive potentially.
(Tax Practitioner 8)

I don't think that [an external facilitator] is necessary, provided that the facilitator is independent of the team that's actually making the assessment. And again, I think it's that distinction between facilitating the process and facilitating the resolution that makes a difference ... and *it seems to me that they should be in a 'facilitate the resolution role', not a 'facilitate the conference role'*.
(Tax Practitioner 10) (emphasis added)

Inland Revenue have some views on the qualifications if you like, or the experience of the facilitator and that view is that *in-depth tax knowledge is really, really helpful*. Yes, somebody can facilitate a discussion without any tax knowledge, but quite often what we are finding from people who have attended these is that one side or the other haven't really understood either the tax issues or the particular weight that has been given to a particular point and the facilitator can tease that out, sometimes put it into pretty plain language if asked.
(Inland Revenue Representative 1) (emphasis added)

I think there is a question of whether you could find the right expertise with external mediators. *You do need to understand the topic, the issues that are involved in a tax dispute and sometimes those issues can be a bit more than a general mediator can necessarily take on board very easily*. There is a question about sort of consistency again ... having external mediators could end up with the taxpayer being highly dependent on who they get as to the sort of outcome they get which is probably less likely with Inland Revenue staff who are aware of the other cases that are around the place.
(Inland Revenue Representative 2) (emphasis added)

When asked for their views on whether the facilitator or mediator should be an independent external person, both of the members of the judiciary agreed that the facilitator or mediator should be external to Inland Revenue:

Well I mean I agree that if you have a mediation or an ADR system of the kind you infer, they should be outside the IRD. But I can't see the IRD accepting that.
(Member of the Judiciary 1)

I think the important thing is that you do have some review outside or an ability to go outside and I think the courts are probably the most logical place for that ... I would have thought that that's part of the taxpayer choice. So taxpayers shouldn't be precluded from having external independent mediators.
(Member of the Judiciary 2)

However, the members of the judiciary appeared to provide differing views on whether the facilitator or mediator should firstly be an expert in mediation or firstly be an expert in tax:

Well, because I'm sort of a rights-based person, I think they should be good at tax.
(Member of the Judiciary 1)

I think they certainly need to be trained. I think the difficulty with people who aren't expert in tax with those small disputes is that you could land up with something not being determined in accordance with the law. However, as soon as you have someone who is expert in tax it's likely to be more expensive ... which is why *a lot of these lay mediation things are done at that lower level and maybe it doesn't matter because at least it means that somebody independent has listened to both sides.*
(Member of the Judiciary 2) (emphasis added)

The above findings pertaining to the modification of DSD Principles 11 and 8 indicate that, particularly from an ADR perspective, best practice suggests that the facilitator or mediator should be an external independent person who is trained in mediation. In order for the system to be fair and perceived as fair, the dispute resolution practitioner must be independent and not be an employee of either side. This further indicates that the current practice of revenue authorities, both in NZ and overseas,⁸ of primarily utilising revenue authority staff as facilitators (or mediators) in their various internal facilitation (or mediation) programs, potentially conflicts with the overarching DSD principle of fairness.

The majority of the interview participants provided no view on modifications to DSD Principles 11 and 8. Seven and six participants, respectively, suggested that DSD Principles 11

⁸ For details on the internal facilitation (or mediation) programs in NZ, Australia, the UK and the US, see Appendices 1.1-1.4 of this thesis, respectively.

and 8 could be modified. Therefore, it is unknown whether the participants who provided no view on the modifications suggested by the other participants would have done so had they been made aware of them. In addition, given the small number of participants interviewed, the findings are based on non-representative data. Thus, on the basis of the interview findings obtained, there is insufficient support to make concrete modifications to these principles. At best, the interview findings can only suggest the potential modification of DSD Principles 11 and 8. The modifications suggested would be dependent on future research soliciting the further views of major stakeholders which confirmed the suggested modifications. Although beyond the scope of this current study, this could be carried out through further interviews, focus groups and/or a survey questionnaire conducted with major stakeholder groups (such as those interviewed in this study) both in NZ and overseas.

While the interview findings from NZ stakeholders potentially suggest that the dispute resolution practitioner should be an external independent party who is trained in mediation, it is unclear as to whether the external independent party should firstly be qualified in dispute resolution and then trained in tax or a tax expert who subsequently receives some recognised training in dispute resolution. The ADR participants interviewed were clearly of the view that best practice is that dispute resolution skills and qualifications are foremostly essential. However, this is at conflict with the views of the Inland Revenue representatives as well as some of the tax practitioners and members of the judiciary interviewed. In addition, it contrasts with the current practice of revenue authorities, both in NZ and overseas, whereby the revenue authority facilitator is (arguably by default) foremostly a tax specialist. Thus, future research is also necessary in ascertaining the particular skills and qualifications required by the dispute resolution practitioner.

7.3.5.2 Suggested modifications to other principles

The interview participants also suggested a range of modifications to principles other than 11 and 8. These modifications are discussed below. However, as indicated in Table 7.4, only small numbers of participants (that is, between 1 and 3 participants) expressed a view on modifications for these principles, with the majority of the participants providing no view. As stated above in section 7.3.5.1, it is unknown whether the participants who provided no view on the modifications suggested by the other participants would have done so had they been made aware of them. Thus, given the small numbers, there is insufficient support from the interview findings to justify modifications to these principles.

The modifications which were suggested for DSD Principles 2, 3, 7 and 10 were based around providing more structure to the system and limiting the number of options available for resolving disputes, as explained in the following comments:

... [T]he right to choose a preferred process ... that should be expressed as being subject to ... agreement, [taxpayers] can express a preference but the IRD or the tax department has to also agree, because most of these processes are essentially consensual so both parties have to agree to them.

(ADR Academic/Practitioner 2)

I think if you look at numbers 2, 7 and 10 ... it seems to me that the intention there is to have as many options available to the parties to resolve their dispute ... *My only concern with that is that will add complexity to the process and sometimes simplicity is best* so the parties kind of know where they stand, they know where they can go if there are options that are fairly compact and not too expansive ... I think simplicity should be sought, so a more limited number [of options].

(Tax Practitioner 8) (emphasis added)

So going to number 3, the system provides for loops backward and forward ... I think that is a very important aspect, but you need to make sure that there is *some structure towards it just to make sure that you actually are making progress as you go through the process rather than going around in circles* ... I think you'd need to make sure that *people aren't exhausting costs and time, and just to try and delay the process* rather than getting to the solution.

(Tax Practitioner 12) (emphasis added)

I think that process would need to be very formulaic in the sense that often when you give people choices, choices give you greater fairness in certain situations but also create complexity ... It is almost better with these disputes things to say 'well this is the kind of way that a dispute goes and here are the steps that you will go through.'

(Tax Practitioner 13)

Furthermore, one of the members of the judiciary believed that, in particular, the number of interests-based options should be limited:

The scope of interests-based resolution should be pretty limited ... if an issue is going to cost more to resolve than it is worth, then [interests-based resolution] is a sensible thing to take into account ... but beyond that I've got pretty major reservations whether issues unrelated to the merits of the case should result in how it is settled.

(Member of the Judiciary 1)

The modifications to DSD Principles 5 and 9 were generally based around changes to address possible perceptions of bias. DSD Principle 5 involved perceptions of bias with respect to assistance being offered to revenue authority staff on ADR techniques, and DSD Principle 9 involved perceptions of bias with respect to offering assistance to taxpayers in choosing a preferred process:

I also thought that principle number 5, the system has an internal person or unit that functions as a mentor and advisor for revenue authority staff ... *there should be assistance for both sides* so that the customer and the IRD staff can use it and there should not be like a specific department there just to help the IRD staff to help them understand the system better because that can be perceived as something unfair if they get help.

(ADR Academic 1) (emphasis added)

I think I had 9 ... so that was assistance is offered for choosing the best process ... I just thought that would be totally better if that responsibility lies with the taxpayer and the taxpayer's advisors, not necessarily the Revenue ... *I don't know whether it would be the best thing for the Revenue, I guess, to be influencing taxpayers* at that stage.

(Tax Practitioner 5) (emphasis added)

In 9, it says assistance is offered for choosing the best process. I thought that was important, but it says the request for ADR should be approved by relevant staff from the above unit and again I wasn't that sure ... as to whether taxpayers can request ADR and the revenue authority can deny it, but that didn't seem to me to be the right outcome.

(Tax Practitioner 12)

The modifications suggested for DSD Principle 6 (the procedures are ordered from low to high cost) generally followed from the concerns raised in section 7.3.3 above, relating to certain tax participants' views that the design of a tax dispute resolution system was more suited to being designed based on the issues rather than the costs associated with the dispute:

I'm not sure how you get the procedures ordering from low to high cost. I'd probably restate that as being 'processes are adaptable to meet the needs of the tax at stake, the tax and issues at stake.'

(Tax Practitioner 10)

Number 6, which is procedures are ordered from low to high cost, *the focus is only on costs and I don't think those are the only factors that come into disputes as priorities*. So sometimes for example, we'll have Inland Revenue that is particularly focused on getting an area of law through the courts and in those types of circumstances it may actually be a waste of taxpayers' time to go through any of the ADR processes. So just focusing on costs to me was a little bit narrow.

(Tax Practitioner 12) (emphasis added)

Some interview participants also suggested that certain changes could be made with a view to improving DSD Principles 12 and 13:

... [T]he only [modification] would be when you are playing around sort of that 12 and 13 area, around the behaviour, so mission, vision, values, but also consistent behaviour and

predictability. Actually, that's probably the word. *Predictability of behaviour from Inland Revenue. I think that's important.*

(Tax Practitioner 11) (emphasis added)

The system is supported by senior revenue authority members. That could be seen as window dressing. It's a question of how that's formulated in such a way, how that it is structured in such a way that it is not just a rubber stamp.

(Tax Academic 3)

7.3.6 Suggested additions to the dispute systems design principles

Table 7.5 lists the suggested additions to the tax DSD principles and the corresponding frequencies of interview participants suggesting each addition.

Table 7.5: Suggested Additions to the Dispute Systems Design Principles

Additional DSD Principle	Frequency⁹
Financial accessibility of the system	3
Timeframes/ timeliness of the procedures	3
Minimisation of cost and delay	3
Certainty of outcomes	3
Flexibility of the system to adapt to different disputes	2
Provision and/or communication of information about the procedures	2
Taxpayers' right to representation and support	1
Prevention of disputes	1
Confidentiality of ADR processes	1
Customisation of the system for ethnic needs	1
Produce good outcomes	1
Provide an even playing field	1
Allow for the full exchange of information between parties	1
Provision for independent review and determination of disputes	1
Specification of the skills and knowledge required by the mediator	1
Relationship between the legal system and the ADR procedures of the system	1
Ensuring that the law is complied with and having public interpretation of the law available	1
No addition	8

⁹ Some of the interview participants suggested more than one addition to the DSD principles. Therefore, the total of the 'Frequency' column is greater than the total number of participants interviewed.

As shown in Table 7.5, 8 participants had no additions to make to the set of DSD principles. The remaining participants suggested a broad range of additional principles. Many of the suggestions put forward by the tax participants appeared to be related to their dissatisfaction with respect to various aspects of the current NZ tax dispute resolution procedures:

The system needs to be accessible to all, so *financial assistance might be required or necessary for some people* ... So in certain circumstances there should be a suspension of interest and penalties where a dispute is not vexatious or frivolous and I think without those being principles you are never going to have a system that works for everyone.

(Tax Practitioner 2) (emphasis added)

... [W]hat I would add in is, *does the process produce good outcomes and also does the brute process minimise delay and unnecessary cost and does the process provide a sort of even playing field*, which it doesn't at the moment. IRD holds all of the cards, IRD can delay as much as they like, whereas the poor old taxpayer is stuck with ridiculous drop dead deadlines.

(Tax Practitioner 4) (emphasis added)

The system has a process for ensuring *timeliness and final resolution*. So in other words there should be an element of deadlines and an element of finality to it ... Timeframes and, I suppose, limits to the number of iterations you can go through.

(Tax Practitioner 7) (emphasis added)

... [A]nd those forms often encourage more rather than less and they also, through the process, encourage duplication. So I would have added in there something around the process has some *flexibility by encouraging the nut of the argument to be highlighted and focused on*.

(Tax Practitioner 10) (emphasis added)

What I thought was lacking in probably all of those, was just some *element of certainty* and it's great having all of these different ADR means available but it is also quite useful to taxpayers to know that if one of those processes are resolved in the taxpayers favour, *at what stage will the revenue authority walk away from the procedure and not follow on it*. So it is just getting in some level of certainty I guess.

(Tax Practitioner 12) (emphasis added)

On the other hand, the suggestions for additional DSD principles suggested by the ADR participants tended to focus more on the practical elements of the dispute resolution process such as confidentiality, prevention of disputes, specification of the skills required by the mediator and flexibility of the system:

I also was thinking of a principle about *confidentiality*. In particular to those elements of the system which are more the ADR-type resolution. I mean things like court proceedings

are definitely not confidential but elsewhere like at the facilitation, that should be confidential and there should be a principle to that effect ... and then I thought that what was also missing was a principle that is part of the *prevention or avoidance of tax disputes*, because the system should have a principle which suggests that everything should be done to prevent them in the first place.

(ADR Academic 1) (emphasis added)

There should be a principle about the *quality of the service provider*. So, what I mean by that is that you can have mediation, but if the mediator is not skilled in both the process skills of mediation and the substantive information that is relevant to tax disputes, then the system will fail.

(ADR Academic/Practitioner 2) (emphasis added)

I think it is a good idea to add in some stuff. One of them would be *flexibility of process and process design* so that the practitioner, whoever it is who is dealing with it, can adapt to the needs of the person and the problem, rather than having to follow a script or you know, steps.

(ADR Practitioner 2) (emphasis added)

The two Inland Revenue representatives suggested additional principles which were largely based on the original aims of the NZ tax dispute resolution procedures set out by the Richardson Committee:

I thought arguably there were some, but more at a high conceptual level, some of which I have sort of taken out of the Richardson aims or as they have been subsequently articulated ... and I guess they feel attractive just at a high level when we talk about things like any such system should be cost effective and efficient and I think there is something about timeliness.

(Inland Revenue Representative 1)

One thing that is not there ... is about exchanging information and I think if you look back at all of the history of the disputes process, then the exchange of information was really a very important principle ... I mean, essentially what Sir Ivor Richardson was saying was that he thought too many cases were going to court on an uninformed basis where parties hadn't adequately exchanged information and he wanted a process where that could occur.

(Inland Revenue Representative 2)

One of the members of the judiciary believed that there should be an additional "overriding" principle concerning a rule of law in relation to taxation disputes. The member of the judiciary noted that taxation disputes are not just disputes between individuals but are disputes between an individual and the State. Furthermore, the State is administering an Act which affects peoples' rights and therefore, the interpretation of legislation in taxation disputes affects other peoples' rights as well. Hence, the following suggestion was made:

Because what we are actually looking at is a constitutional issue of the role of the court in the supervision of executive action and ensuring that the law is complied with and the other factor of having that public interpretation of the law available to the public and to other taxpayers ... So that, I think should be an overriding principle.
(Member of the Judiciary 2)

Table 7.5 shows that for six of the additional principles suggested, more than one participant suggested the addition of that particular principle. However, only small frequencies of participants (that is, 2 or 3) expressed views in common for these six principles, with the majority of the participants expressing no view. Therefore, notwithstanding the wide range of additional principles identified, based on the interview data there is insufficient support from the frequencies to justify the addition of any of the additional DSD principles suggested by the interview participants.

7.3.7 Suggested deletions to the dispute systems design principles

Table 7.6 shows the frequencies for each of the tax DSD principles for which the interview participants suggested the deletion of.

Table 7.6: Suggested Deletions to the Dispute Systems Design Principles

DSD Principle	ADR Participants	Tax Participants	Inland Revenue Representatives	Members of the Judiciary	Total¹⁰
1					
2					
3					
4	1				1
5		1			1
6	3	2			5
7					
8					
9		1			1
10					
11					
12	1	1			2
13	2	1	1		4
14					
No Deletions	5	13	1	2	21

As indicated in Table 7.6, the majority (21) of the participants had no deletions to make to the set of DSD principles. Five interview participants thought that DSD Principle 6, the procedures are ordered from low to high cost, should be deleted. The reasons given for its deletion were mostly concerned with the view that the focus of the design of the system should be on the effectiveness of the system rather than the cost. In addition, one ADR participant believed that litigation was not necessarily always the costliest dispute resolution option:

I didn't really agree with low to high cost procedure order, I feel it should be the best fit, it is a one-off process.
(ADR Practitioner 7)

My view is that the dispute resolution system should be as effective as possible and if there is a trade-off between costs and effectiveness, the latter should be given a higher priority. Therefore 'costs' shouldn't be a principle of the dispute resolution system itself.
(ADR Academic 1)

¹⁰ Some of the interview participants suggested more than one deletion. Therefore, the sum of the 'Total' column is not equal to the total number of participants interviewed.

I don't like principle 6. I think it could be deleted ... cost is obviously a very important factor, my problem with it is that it is not always the case that going to court is more expensive than going to mediation.

(ADR Academic/Practitioner 2)

One tax practitioner also thought that DSD Principle 6 in certain circumstances could potentially be redundant:

I just wondered about 6, and this sort of feeds into my understanding of 7, but I sort of thought, well if [you had] 7, the system has multiple access points ... would you need 6 then? *I think that is a really good idea that procedures are ordered from low to high cost, but that is only if you need to follow those steps in that particular order.* If you are able to come in at different access points or whatever, that would be redundant, you wouldn't need that.

(Tax Practitioner 5) (emphasis added)

Four interview participants thought that DSD Principle 13, the alignment of the dispute resolution system with the mission, vision and values of the organisation, could be deleted. Notwithstanding that it was the most frequently suggested principle which was perceived as being the least important, as suggested by the comments below, it appeared that participants were somewhat ambivalent on its deletion:

The only one that I think should be deleted is probably 13 ... They seem to be addressing the internal staff, so I can sort of see why it is there ... But, you know, I don't have a strong opinion.

(ADR Practitioner 1)

I wasn't convinced by the one about how it has to reflect the mission statement of the organisation. *I think there is a point there, but as I say it is only going to be as valuable as the vision and mission of the organisation* and if it is a horrible, culturally kind of unsound and unpleasant, kind of place to be, then its dispute resolution system, you absolutely don't want reflecting that ... I thought that maybe was a principle I might be willing to sacrifice.

(ADR Academic/Practitioner 1) (emphasis added)

I would say number 13 because it is already implied in the taxpayer charter ... they are all internal processes of the Inland Revenue, they should have these functions anyway so you are just stating the obvious.

(Tax Academic 1)

Given the small numbers of participants which suggested the deletion of a particular DSD principle (with the majority of the participants providing no view), there is insufficient support from the interview findings to justify the deletion of any of the DSD principles. The deletion

of a DSD principle also needs to be considered in the light of the comments provided earlier in section 7.3.4, that some participants were of the view that all of the principles were required in a dispute resolution system. In addition, the initial tax DSD principles have been derived from the well-established DSD literature and would thus require a strong basis to support their deletion. Furthermore, the views of other major stakeholder groups have not been sought regarding the deletion of a particular DSD principle. For example, as indicated by the comments provided earlier in section 7.3.4, arguably it would be expected that DSD Principle 6 would be regarded as an important principle for taxpayers in tax disputes as a significant stakeholder group whose views have not been sought in this study.

7.3.8 Recognition of the different ethnic backgrounds of taxpayers

With the exception of 4 interview participants, all of the participants thought that the dispute resolution system should recognise the different ethnic backgrounds of taxpayers. Some of the participants indicated that there was already a general societal obligation that the different ethnic backgrounds of people are recognised:

I don't think anyone can quarrel with the idea that New Zealand is such a multi-cultural community now [and] that in order to be effective one would hope that we are communicating with people using the languages that they choose to communicate in. So, yeah, I don't think one could really quarrel with the idea that it is a good thing to recognise different ethnic backgrounds.

(ADR Practitioner 5)

We do it [recognise different ethnic backgrounds] when we have voting ... when you go into a doctor's office we do it, there is health information in different languages. You know, we have a huge awareness where things are important to people of making sure that they can read them and understand them. So, yes, of course we should.

(ADR Academic/Practitioner 1)

New Zealand is increasingly becoming very culturally diverse ... If that is the case, then we definitely have to recognise the different ethnic backgrounds of the taxpayers. Ethnic backgrounds imply cultural values and cultural values are long lasting values.

(Tax Academic 1)

It was also suggested that it was an obligation under the Treaty of Waitangi and other NZ statutes:

Oh, absolutely it [the recognition of different ethnic backgrounds] should. Absolutely it should, and that would be a Treaty obligation anyway.

(ADR Practitioner 6)

I think we have got a statutory requirement to deal with some of this stuff. I mean we have a statutory requirement to provide stuff in Maori, we have a statutory requirement to deal with disability ... you know these things are a matter of New Zealand law and I don't think they are just a matter for dispute resolution.

(ADR Academic/Practitioner 1)

A number of interview participants thought that the recognition extended beyond differences in ethnicity to other issues of diversity including various disabilities and incapacities:

The issue is multi-cultural. Ethnicity, and it is beyond ethnicity, I would just say diversity. *That is only just scratching the surface of diversity issues to talk about ethnicity.* I think that is very basic. Then there are all the other cultural, the visible, the invisible, issues of gender identification, issues of mental capacity and incapacity, disability, illness.

(ADR Practitioner 1) (emphasis added)

Yes, I think that is important, but I don't think that it is sufficient to focus on ethnicity. I think *there are other issues such as education, but also disability ...* So I think that it is not just ethnicity or culture in the sense that, 'do you come from a different place?' But *it is all kinds of things that impact on people and make them unique* and I think that there is not enough focus on those differences in the current system ... so the principles do have to recognise those things.

(Tax Practitioner 2) (emphasis added)

Well, I think any large government department has to accommodate people who don't speak English, people who are deaf, hearing impaired or speech impaired or to some extent anyway, people who don't have access to computers or the other things which everyone else does.

(Member of the Judiciary 1)

However, most of the interview participants made the distinction that the recognition of the different ethnic backgrounds of taxpayers was an important factor in the delivery of the dispute resolution system as opposed to being regarded as an individual design principle per se. Moreover, it was noted that whilst the dispute resolution system could be delivered in different ways, the same dispute resolution system and rules of the system applied to all taxpayers regardless of their ethnicity:

[A]ny dispute resolution system should take note of the different ethnic backgrounds of people using it. So that is not to say that the outcomes will be any different, but there may be things that you do within the provision of the dispute resolution system that meets different cultural needs and in fact different disability needs.

(ADR Practitioner 3)

One law affects everyone and that's just the way it is, but in terms of how you impart the resolution of disputes and what adds awareness generally within different cultural groups about the law ... that can be adapted and in some ways is more efficient if you impart things the way people understand then you are obviously going to get, the theory is anyway, better compliance.

(Tax Practitioner 9)

So I think that what you are saying is should we recognise the different ethnic backgrounds of taxpayers? Yes. But I don't think it necessarily needs to be in the design of the tax system, I think it needs to be in how the disputes resolution system is carried out.

(Tax Practitioner 12)

My view is that people can do whatever [ethnic] introduction they like but as far as principles and the rules of disputes resolution, then the same rules apply regardless of race, ethnic background, religion, sex, whatever and there is not parallel systems or procedures regardless of which race you belong to.

(Tax Academic 2)

I don't think it is so much a design principle, so much as a decision about a delivery mechanism.

(Inland Revenue Representative 1)

With respect to how the tax dispute resolution system should recognise the different ethnic backgrounds of taxpayers, comments provided by interview participants included the following:

I do think that ... ideally the forms should be provided in different languages and also the facilitator ideally should be trained in intercultural communication.

(ADR Academic 1)

I think that as long as interpreters are a part of the system and there is access to them ... and there is support people able to come to or be involved in anything, any of the resolution processes, then that should cover it.

(ADR Practitioner 4)

I think there should probably be an acknowledgement on that, in that everybody should have the facility to converse in their first language, but I'm not sure that beyond that anything is probably required ... maybe it's more of an acknowledgement and then giving a specific right to people to converse in their first language which I think is the case informally at the moment anyway.

(Tax Practitioner 8)

[T]he taxpayer's entitled to bring who they want along to those conference phases ... so I think that can accommodate it. I think the written parts of the process are much harder to accommodate it. I can't see that we can move to allowing NOPAs and NORs etcetera to being written in languages other than English. It's a wee bit harder to move the system that far I think.

(Tax Practitioner 10)

You know, obviously Inland Revenue thinks about allowing translators along or whanau support or different things like that. We will always be open to other ideas, but I don't have any brilliant ones myself.

(Inland Revenue Representative 1)

If you look at Inland Revenue, we have various people that go into ethnic communities and you could ensure that you sort of bring that in with the disputes process ... I don't actually know how it works there, but I would hope that assistance would be available at any point that a non-English speaking taxpayer was involved with Inland Revenue.

(Inland Revenue Representative 2)

However, the above responses given by the interview participants to the questions regarding the recognition of the different ethnic backgrounds of taxpayers reflect the fact that all of the interview participants, except for one, were of European ethnicity.¹¹ Hence, the responses reflect the mainstream view of the predominantly NZ European participants interviewed. This data collection issue therefore, presents a possible limitation to the interview findings. Nevertheless, while the spread of ethnic groups of the participants interviewed does not reflect the distribution of ethnic groups in the NZ taxpayer population generally, it arguably reflects the ethnic distribution of the major stakeholders in the tax dispute resolution system in NZ.

As recognised by the sole non-European interview participant, NZ is becoming increasingly more culturally diverse:

Statistics New Zealand has ... projected to 2025, that the Western European population is falling, the Maori is retaining, but both the Asian and the Pacific groups are increasing and not only that, we are now having an increasing number of people from the African nations as well, and Middle Eastern.

(Tax Academic 1)

Thus, the recognition of ethnicity is likely to become a larger issue in the future as the cultural demographics of NZ change. This is similarly the case for most Organisation for Economic

¹¹ There were difficulties in obtaining interview participants from non-European ethnic backgrounds who had experience and/or knowledge in dispute resolution and/or the NZ tax dispute resolution procedures due to the limited numbers of such individuals. Moreover, potential participants from non-European ethnic backgrounds which were approached by the researcher were generally unwilling to participate.

Co-operation and Development (OECD) countries.¹² Prior research has shown that cultural values impact on taxpayers' compliance behaviour and the way in which they perceive tax authorities.¹³ This in turn impacts on the way ethnic taxpayers behave and interact with tax authorities. Accordingly, this has implications on how revenue authorities interact with ethnic taxpayers, particularly with respect to tax dispute resolution. The non-European interview participant underscored the importance of this by suggesting that an additional DSD principle should be added in relation to ethnic taxpayers:

In terms of additional tax DSD principles, I would like to see an additional one where there is an option or there is a process in which to customise to ethnic taxpayers' needs, the needs of migrants who are not customised or who are not accustomed to New Zealand's tax system or the New Zealand dispute resolution process ... IRD staff, whoever that is involved with the dispute resolution process, must be culturally competent and culturally sensitive to the needs of the ethnic taxpayers.

(Tax Academic 1)

However, no other participants made suggestions for modifications and/or additions to the tax DSD principles with respect to recognising ethnic taxpayers. Notwithstanding this, as indicated earlier in chapter 6, section 6.3.1, the recognition of the different ethnic backgrounds of taxpayers is already incorporated within the tax DSD principles. Principle 7 states that "multiple forms of access to the system should be provided through the provision of forms and guides in different languages and in alternative formats, and a choice of access persons should be available for certain taxpayers to approach (including non-English speaking taxpayers and deaf, hearing-impaired or speech-impaired taxpayers)." Thus, recognition of the different ethnic backgrounds of taxpayers through providing multiple forms of access to the system procedurally to ethnic and certain other types of taxpayers is recognised as a delivery mechanism of the tax dispute resolution procedures within the existing set of tax DSD principles. This aligns with the views expressed above by the majority of the interview participants.

The researcher additionally notes that the recognition of the different ethnic backgrounds of taxpayers is generally recognised in the taxpayer charters (or equivalents) of revenue authorities.¹⁴ For example, in *Inland Revenue's Charter*, under the heading "How we will work with you", Inland Revenue state that they "will be responsive to individual and cultural

¹² Sue Yong "Tax Compliance and Small and Medium Enterprise Operators: An Intra-Cultural Study in New Zealand" (PhD Dissertation, Auckland University of Technology, 2011) at 30.

¹³ See, for example, Sue Yong, above n 12 and Sue Yong "Cultural diversity and tax compliance of SME entrepreneurs" (paper presented to the Australasian Tax Teachers Association Conference, Sydney, 16-18 January 2012).

¹⁴ For further information, see Duncan Bentley *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer Law International, The Netherlands, 2007) at 310-311.

needs.”¹⁵ Similarly, the ATO’s *Taxpayer’s Charter* includes a heading “Treating you fairly and reasonably”¹⁶ under which taxpayers can expect, inter alia, that the ATO will “be sensitive to the diversity of the Australian community.”¹⁷ Thus, the recognition of culture and diversity in the administration of the overall tax system (which also encompasses tax dispute resolution) arguably provides further support for the recognition of ethnic taxpayers as part of the delivery of the dispute resolution procedures rather than as a separate DSD principle. The general recognition of taxpayers with special needs by most tax administrations also aligns with DSD Principle 11, the system is fair and perceived as fair.

Nevertheless, the four tax practitioner participants who did not think that the tax dispute resolution system should recognise the different ethnic backgrounds of taxpayers generally were of the view that professional advisors should assist in the recognition of ethnic issues:

I think inevitably ... [a] taxpayer is going to need professional help almost always in undertaking a tax dispute and in that case the professional advisor will be the person that copes with any particular ethnic issues.

(Tax Practitioner 7)

I think the time for ... acknowledging different ethnicities and having assistance and advice in different languages is upfront in terms of explaining the system and people’s obligations to them so that you make them compliant ... You probably have brochures and things like that if you are in dispute [and] have them in a different language. But *ultimately if that’s the case, people should have advisors involved* ... that should remove the barrier to language.

(Tax Practitioner 11) (emphasis added)

7.4 Summary

This chapter has presented the findings from the interviews conducted with 30 selected stakeholders in NZ on the tax DSD principles developed. The findings indicate that the majority of the interview participants thought that the most important (and overarching) principle was DSD Principle 11, that the system is fair and perceived as fair. The administrative-type principles such as DSD Principles 13 and 12, relating to the alignment of the system with the mission, vision and values of the organisation and support of the system by senior revenue

¹⁵ Inland Revenue *Inland Revenue’s Charter* (IR 614, March 2009) at 1.

¹⁶ Australian Taxation Office *Taxpayer’s Charter – What you need to know* (Canberra, June 2010) at 2.

¹⁷ At 2. HM Revenue and Customs’ (HMRC’s) *Your Charter* and the Internal Revenue Service’s (IRS’s) *Taxpayer Bill of Rights* do not contain specific statements on culture and diversity per se. However, cultural aspirations are arguably implied through some of the general rights of taxpayers that are outlined. See HM Revenue and Customs “Your Charter” (12 January 2016) <<https://www.gov.uk/government/publications/your-charter/your-charter#A2>> (last accessed 7 November 2016); and Internal Revenue Service *Your Rights as a Taxpayer* (IRS Pub. No. 1, December 2014).

authority members, were most frequently regarded by participants as the least important principles.

The majority of the interview participants, when asked, were able to provide a numerical ranking of the 14 principles in order of importance from highest to lowest. A number of participants, however, suggested that providing some form of categorisation of the principles was potentially more helpful than giving a precise ranking of the principles. Nevertheless, the rankings provided broadly indicated that the principles regarding fairness, taxpayer choice and stakeholder involvement in the design process were typically ranked the highest. These were generally followed by the principles relating to taxpayer assistance. As stated above, the administrative-type principles relating to the revenue authority itself were typically ranked as the least important.

From the findings pertaining to the modification, addition or deletion of the tax DSD principles, given the small frequencies of participants that suggested particular changes (with the majority expressing no view) there is insufficient evidence to justify any concrete changes to the tax DSD principles. Hence, a limitation to the interview findings is that it is unknown whether the participants who provided no view on the modifications, additions and deletions which were suggested by other participants would have done so had they been made aware of them. Furthermore, concrete changes to the principles cannot be justified as the small number of participants interviewed cannot provide certainty as to being representative of the populations they are drawn from. Therefore, the interview findings are limited to providing suggestions for changes to the tax DSD principles only. The suggested changes may potentially be confirmed or refuted through further research in the future which solicits the views of major stakeholder groups, both in NZ and overseas, on the suggested changes.

The findings suggest that, particularly from an ADR perspective, best practice indicates that the facilitator or mediator should be an external independent person who is trained in mediation. In order for the system to be fair and perceived as fair the dispute resolution practitioner must be independent and not be an employee of either side. Accordingly, the findings suggest the possible modification of DSD Principles 11 and 8 to take into account the inclusion of external independent dispute resolution practitioners (which are trained in mediation) in the system as distinct from revenue authority staff acting as facilitators or mediators. However, as stated above, the modifications to the tax DSD principles would be dependent on further confirmatory research being conducted. Further research is also necessary in order to ascertain whether the dispute resolution practitioner should foremostly be an expert in mediation or firstly be a specialist in tax.

The interview findings also revealed that the majority of the participants thought that the tax dispute resolution system should recognise the different ethnic backgrounds of taxpayers in the

delivery of the system as opposed to being recognised as a separate design principle per se. However, these findings may also be limited in the respect that they represent the views of the predominantly NZ European ethnic group of participants which made up the stakeholders interviewed.

Based on the interview findings on the tax DSD principles discussed in this chapter, the next chapter will outline the suggested changes to the set of tax DSD principles. The next chapter will also discuss the interview findings on the tax DSD principles in the context of NZ and consequently make recommendations with respect to the application of the suggested changes to the DSD principles in the existing NZ tax dispute resolution procedures.

Chapter 8: Suggested Changes to the Tax Dispute Systems Design Principles and Interview Findings: The Tax Dispute Systems Design Principles in the New Zealand Context

8.1 Introduction

This chapter outlines the suggested changes to the tax dispute systems design (DSD) principles based on the interview findings discussed in chapter 7. The chapter then discusses the interview findings on the tax DSD principles in the context of New Zealand (NZ) and makes recommendations for the application of the suggested changes to the tax DSD principles in NZ. Accordingly, section 8.2 outlines the suggested changes to the set of tax DSD principles. Section 8.3 presents the interview findings on the tax DSD principles in the context of NZ and section 8.4 subsequently provides recommendations on the application of the suggested changes to the tax DSD principles in the current NZ tax dispute resolution procedures. Section 8.5 provides a chapter summary.

8.2 Suggested Changes to the Tax Dispute Systems Design Principles

Table 8.1 which follows, illustrates the development of the suggested tax DSD principles. The first column shows the general DSD principles, derived from the prior DSD literature in chapter 2, which have then been modified based on the findings from the cases studies of the four jurisdictions to give the tax DSD principles shown in the third column. Hence, the first three columns replicate Table 6.2 in chapter 6 and provide the basis for the suggested changes to the tax DSD principles. The last column of Table 8.1 shows the suggested tax DSD principles based on the suggested modifications (provided in column four) derived from the interview findings in chapter 7.

The second column of Table 8.1 (as discussed in detail in chapter 6, section 6.3) shows that the main modifications made to the general DSD principles to give the tax DSD principles were the provision of examples or additional information with respect to the DSD principles applied in the tax context (with only one substantive modification made to the wording of DSD Principle 5). The fourth column of Table 8.1 shows that few further changes to the tax DSD principles have been suggested from the interview findings. That is, modifications have been suggested for DSD Principles 8 and 11.

Table 8.1: Development of the Suggested Tax Dispute Systems Design Principles

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
(1) Stakeholders are included in the design process. Stakeholders should have an active and integral role in creating and renewing the systems they use.	-Examples of stakeholder involvement in the design process in the tax dispute resolution context are provided.	(1) Stakeholders are included in the design process. For example, stakeholders may be involved in revenue authority alternative dispute resolution (ADR) program pilots and in reviews and consultations on the tax dispute resolution system.	None	(1) Stakeholders are included in the design process. For example, stakeholders may be involved in revenue authority ADR program pilots and in reviews and consultations on the tax dispute resolution system.
(2) The system has multiple options for addressing conflict including interests, rights and power-based processes. The system should include interests-based processes and low-cost rights and power-based processes should be offered should interests-based processes fail to resolve a dispute.	-Examples of options available for addressing disputes in the tax dispute resolution context are provided. -The availability of interests and rights-based ADR options at the audit and litigation stages is included.	(2) The system has multiple options for addressing conflict including interests, rights and power-based processes. For example, the system's options for addressing conflict may include: direct negotiation, internal review and litigation as well as interests and rights-based ADR options. In addition, interests and rights-based ADR options should also be available at the audit and litigation stages.	None	(2) The system has multiple options for addressing conflict including interests, rights and power-based processes. For example, the system's options for addressing conflict may include: direct negotiation, internal review and litigation as well as interests and rights-based ADR options. In addition, interests and rights-based ADR options should also be available at the audit and litigation stages.

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
(3) The system provides for loops backward and forward. The system should include loop-back mechanisms which allow disputants to return from rights or power-based options back to interest-based options and also loop-forward mechanisms which allow disputants to move directly to a rights or power-based option without first going through all of the earlier interest-based options.	-Examples of loop-back and loop-forward mechanisms in the tax dispute resolution context are provided.	(3) The system provides for loops backward and forward. Loop-back mechanisms allow parties to return from rights or power-based options back to interests-based options and loop-forward mechanisms allow parties to move directly to a rights-based option without having to go through all of the earlier interest-based options. For example, ADR options available at the litigation stage can provide loop-back mechanisms and the ability for taxpayers to by-pass the revenue authority's internal review process can provide a loop-forward mechanism.	None	(3) The system provides for loops backward and forward. Loop-back mechanisms allow parties to return from rights or power-based options back to interests-based options and loop-forward mechanisms allow parties to move directly to a rights-based option without having to go through all of the earlier interest-based options. For example, ADR options available at the litigation stage can provide loop-back mechanisms and the ability for taxpayers to by-pass the revenue authority's internal review process can provide a loop-forward mechanism.
(4) There is notification before and feedback after the resolution process. Notification in advance of taking a proposed action affecting others can prevent disputes that	-Examples of forms of notification and feedback in the tax dispute resolution context are provided.	(4) There is notification before and feedback after the resolution process. Notification in advance of taking a proposed action affecting others can prevent disputes that arise through misunderstanding or	None	(4) There is notification before and feedback after the resolution process. Notification in advance of taking a proposed action affecting others can prevent disputes that arise through

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
<p>arise through misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future.</p>		<p>miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future. For example, in order to prevent disputes from arising, general notification of potential areas for tax disputes can be provided through the revenue authority's compliance activities and campaigns, and through the publication of case notes on court decisions. To prevent similar disputes in the future, feedback on disputes can be provided through the publication of general statistics on dispute matters and through post-dispute analysis and publication of feedback collected from participants in revenue authority ADR programs.</p>		<p>misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future. For example, in order to prevent disputes from arising, general notification of potential areas for tax disputes can be provided through the revenue authority's compliance activities and campaigns, and through the publication of case notes on court decisions. To prevent similar disputes in the future, feedback on disputes can be provided through the publication of general statistics on dispute matters and through post-dispute analysis and publication of feedback collected from participants</p>

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
				in revenue authority ADR programs.
(5) The system has a person or persons who function as internal independent confidential neutral(s). Disputants should have access to an independent confidential neutral to whom they can go to for coaching, referring and problem-solving.	-Replaced: “person or persons who function as internal independent confidential neutral(s)” with “internal person or unit that functions as a mentor or advisor”; “disputants” with “revenue authority staff”; and “coaching, referring and problem-solving” with “mentoring and advice on ADR techniques” in order to provide greater relevance of this DSD principle in the tax dispute resolution context.	(5) The system has an internal person or unit that functions as a mentor and advisor for revenue authority staff. Revenue authority staff should have access to an internal person or unit to which they can go to for mentoring and advice on ADR techniques.	None	(5) The system has an internal person or unit that functions as a mentor and advisor for revenue authority staff. Revenue authority staff should have access to an internal person or unit to which they can go to for mentoring and advice on ADR techniques.
(6) Procedures are ordered from low to high cost. In order to reduce the costs of handling disputes, the procedures in the system should be arranged in graduated steps in a low to high cost sequence.	-Included the exception in the context of tax dispute resolution that high upfront costs are generally likely to be incurred by taxpayers. -Included the qualification that the use of additional ADR options can add additional costs at the stage of the formal disputes procedures at which they	(6) Procedures are ordered from low to high cost. The steps in the formal dispute procedures should be arranged in a low to high cost sequence (notwithstanding that high upfront costs are generally likely to be incurred by taxpayers involved in tax disputes). The use of	None	(6) Procedures are ordered from low to high cost. The steps in the formal dispute procedures should be arranged in a low to high cost sequence (notwithstanding that high upfront costs are generally likely to be incurred by taxpayers involved in tax disputes). The use of

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
	are utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes.	additional ADR options can also add additional costs at the stage of the formal dispute procedures at which they are utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes.		additional ADR options can also add additional costs at the stage of the formal dispute procedures at which they are utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes.
(7) The system has multiple access points. The system should allow disputants to enter the system through many access points and offer a choice of persons whom system users may approach in the first instance.	<ul style="list-style-type: none"> -Examples of multiple structural points of access in the tax dispute resolution context are provided. -Examples of different methods of delivering notification of entry to the system are provided. -Examples of multiple procedural forms of access to the system such as the provision of forms and guides in different languages and formats, and providing a choice of access persons for taxpayers in particular circumstances to approach, are provided. 	(7) The system has multiple access points. The system should allow taxpayers to enter the system through many access points, structurally. For example, entry at the level of internal review or entry at the level of external appeal. There should also be a range of methods to deliver notification of entry to the dispute resolution system. For example, by personal delivery, by electronic means of communication or by post. In addition, multiple forms of access to the system should be provided through the	None	(7) The system has multiple access points. The system should allow taxpayers to enter the system through many access points, structurally. For example, entry at the level of internal review or entry at the level of external appeal. There should also be a range of methods to deliver notification of entry to the dispute resolution system. For example, by personal delivery, by electronic means of communication or by post. In addition, multiple forms of access to the system should be

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
		provision of forms and guides in different languages and in alternative formats, and a choice of access persons should be available for certain taxpayers to approach (including non-English speaking taxpayers and deaf, hearing-impaired or speech-impaired taxpayers).		provided through the provision of forms and guides in different languages and in alternative formats, and a choice of access persons should be available for certain taxpayers to approach (including non-English speaking taxpayers and deaf, hearing-impaired or speech-impaired taxpayers).
(8) The system includes training and education for stakeholders. Training of stakeholders in conflict management as well as education about the dispute system and how to access it are necessary.	-Examples of forms of training and education in the tax dispute resolution context are provided.	(8) The system includes training and education for stakeholders. For example, the general in-house training of revenue authority staff should include a specific component on conflict management and resolution. Revenue authority staff acting as facilitators or mediators should receive specialised training in mediation developed by external ADR specialists. Education about the dispute system can be	-Replace the reference to ‘Revenue authority staff acting as facilitators or mediators should receive specialised training in mediation developed by external ADR specialists’ with ‘Dispute resolution practitioners in the system should have recognised external training in dispute	(8) The system includes training and education for stakeholders. For example, the general in-house training of revenue authority staff should include a specific component on conflict management and resolution. Dispute resolution practitioners in the system should have recognised external training in dispute resolution. Education about the dispute system can be provided through

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
		provided through information about the dispute resolution procedures provided on the revenue authority's website, the publication of guides on the dispute resolution procedures, revenue authority guidelines on the dispute procedures and online learning material for tax agents.	resolution' in order to reflect the possible utilisation of external independent dispute resolution practitioners in the dispute resolution system who have recognised external training in dispute resolution.	information about the dispute resolution procedures provided on the revenue authority's website, the publication of guides on the dispute resolution procedures, revenue authority guidelines on the dispute procedures and online learning material for tax agents.
(9) Assistance is offered for choosing the best process. This includes the use of guidelines and/or coordinators and process advisors to ensure the appropriate use of processes.	-Examples of forms of assistance in choosing the best process in the context of tax dispute resolution are provided.	(9) Assistance is offered for choosing the best process. For example, revenue authority guidelines on the dispute resolution procedures in order to assist in the appropriate use of processes, and the existence of a unit within the revenue authority responsible for overseeing (and providing advice on) the ADR programs available. In addition, requests for ADR should be approved by relevant staff from the above unit.	None	(9) Assistance is offered for choosing the best process. For example, revenue authority guidelines on the dispute resolution procedures in order to assist in the appropriate use of processes, and the existence of a unit within the revenue authority responsible for overseeing (and providing advice on) the ADR programs available. In addition, requests for ADR should be approved by relevant staff from the above unit.

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
(10) Disputants have the right to choose a preferred process. The best systems are multi-option with disputants selecting the process.	<p>-Replaced “Disputants” with “Taxpayers” to provide greater relevance to the principle in the tax dispute resolution context.</p> <p>-Examples of choosing a preferred process in the context of tax dispute resolution are provided.</p>	(10) Taxpayers have the right to choose a preferred process. Choice of a preferred process may be offered in a number of ways including (but not limited to): taxpayers can choose to have an internal review, appeal externally or do both; the choice for taxpayers to use ADR is made available alongside their existing review and appeal rights; taxpayers can choose to use ADR (if it is appropriate) once a dispute reaches a tribunal or court; and qualifying taxpayers can choose to have matters dealt with in a tribunal or court using small tax case procedures.	None	(10) Taxpayers have the right to choose a preferred process. Choice of a preferred process may be offered in a number of ways including (but not limited to): taxpayers can choose to have an internal review, appeal externally or do both; the choice for taxpayers to use ADR is made available alongside their existing review and appeal rights; taxpayers can choose to use ADR (if it is appropriate) once a dispute reaches a tribunal or court; and qualifying taxpayers can choose to have matters dealt with in a tribunal or court using small tax case procedures.

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
<p>(11) The system is fair and perceived as fair. The system should be fair to parties and foster a culture that welcomes good faith dissent.</p>	<p>-Examples of aspects which may affect the fairness and perceived fairness of the system in the context of tax dispute resolution are provided.</p>	<p>(11) The system is fair and perceived as fair. The dispute resolution system as a whole should be fair and perceived as fair. For example, the internal review function of the revenue authority should be independent from the audit or compliance function. In addition, revenue authority staff acting as facilitators or mediators in ADR programs of the revenue authority should be fair and perceived as fair. For example, revenue authority facilitators or mediators should have had no prior involvement in the particular dispute.</p>	<p>-Replace ‘revenue authority staff acting as facilitators or mediators in ADR programs of the revenue authority should be fair and perceived as fair. For example, revenue authority facilitators or mediators should have had no prior involvement in the particular dispute’ with ‘dispute resolution practitioners utilised in the system should be fair and perceived as fair. For example, dispute resolution practitioners should have had no prior involvement in the particular dispute’ to reflect the possible utilisation</p>	<p>(11) The system is fair and perceived as fair. The dispute resolution system as a whole should be fair and perceived as fair. For example, the internal review function of the revenue authority should be independent from the audit or compliance function. In addition, dispute resolution practitioners utilised in the system should be fair and perceived as fair. For example, dispute resolution practitioners should have had no prior involvement in the particular dispute.</p>

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
			of external independent dispute resolution practitioners in the system.	
(12) The system is supported by top managers. There should be sincere and visible championship by senior management.	-Replaced “top managers” with “senior revenue authority members” to provide greater relevance to the principle in the tax dispute resolution context. -Examples of championship by senior management in the tax dispute resolution context are provided.	(12) The system is supported by senior revenue authority members. There should be visible evidence of sincere championship of the dispute resolution system and of ADR by senior revenue authority members. For example, through speeches, presentations, media statements or other releases.	None	(12) The system is supported by senior revenue authority members. There should be visible evidence of sincere championship of the dispute resolution system and of ADR by senior revenue authority members. For example, through speeches, presentations, media statements or other releases.
(13) The system is aligned with the mission, vision and values of the organisation. The system should be integrated into the organisation and reflect the organisational mission, vision and values.	-Examples of integration of the dispute resolution system in the organisation and alignment of the revenue authority’s dispute resolution approach with the mission, vision and values of the organisation in the tax dispute resolution context are provided.	(13) The system is aligned with the mission, vision and values of the organisation. For example, the dispute resolution system should be integrated into the organisation through the revenue authority’s taxpayers’ charter (or equivalent), and the revenue authority’s	None	(13) The system is aligned with the mission, vision and values of the organisation. For example, the dispute resolution system should be integrated into the organisation through the revenue authority’s taxpayers’ charter (or equivalent), and the

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
		approach towards dispute resolution, outlined in its Disputes Policy (or equivalent), should be aligned with its overall mission, vision and values. In addition, the revenue authority's future plans with respect to dispute resolution should feature in its Strategic Plan (or equivalent).		revenue authority's approach towards dispute resolution, outlined in its Disputes Policy (or equivalent), should be aligned with its overall mission, vision and values. In addition, the revenue authority's future plans with respect to dispute resolution should feature in its Strategic Plan (or equivalent).
(14) There is evaluation of the system. This acts to identify strengths and weaknesses of design and foster continuous improvement.	-Examples of evaluation of the system in the context of tax dispute resolution are provided.	(14) There is evaluation of the system. For example, evaluation of the tax dispute resolution system can occur through regular or one-off surveys on the system conducted for the revenue authority by external agencies; evaluation can be provided by submissions, reviews and reports from government-appointed entities, parliamentary committees and other external stakeholders; taxpayers can provide general feedback on the	None	(14) There is evaluation of the system. For example, evaluation of the tax dispute resolution system can occur through regular or one-off surveys on the system conducted for the revenue authority by external agencies; evaluation can be provided by submissions, reviews and reports from government-appointed entities, parliamentary committees and other external stakeholders; taxpayers can provide general feedback on the

DSD Principle	Modifications	Tax DSD Principle	Suggested Modifications from Interviews	Suggested Tax DSD Principle
		system (for evaluation) to the revenue authority, for example, through completing online forms and participants in ADR programs can be invited to provide feedback (for evaluation) at the conclusion of the ADR process.		system (for evaluation) to the revenue authority, for example, through completing online forms and participants in ADR programs can be invited to provide feedback (for evaluation) at the conclusion of the ADR process.

As highlighted earlier in chapter 7, sections 7.3.5 – 7.3.7, with respect to modifying, adding or deleting any of the tax DSD principles, given the small frequencies of participants suggesting particular changes (with the majority expressing no view), there is insufficient evidence from the interviews to justify any concrete changes to the tax DSD principles. It is unknown whether the participants who provided no view on the modifications, additions and deletions which were suggested by other participants would have done so, had they been made aware of them. However, this is acknowledged as an unavoidable limitation of the interviews conducted in this study, unless follow-up interviews were feasible. In addition, concrete changes to the principles cannot be justified as the small number of participants interviewed cannot provide certainty as to being representative of the populations they are drawn from. Thus, the interview findings are restricted to providing suggestions for changes to the tax DSD principles. These suggested changes may potentially be confirmed or refuted through further research in the future which solicits the views of major stakeholder groups, both in NZ and overseas, on the suggested changes.

In particular, caution must be exercised with respect to the deletion of any of the tax DSD principles given that when asked to rank the principles in chapter 7, section 7.3.4 of this thesis, many of the participants found the exercise quite “arbitrary” and felt that the principles were “all quite important” as part of a dispute resolution system. Moreover, the initial tax DSD principles have been derived from the well-established DSD literature and would thus require a strong basis to support their deletion. While the interview findings do not provide sufficient support for suggested additions or deletions to the tax DSD principles, as shown in column four of Table 8.1, the findings suggest the possible modification of DSD Principles 11 and 8 to take into account the inclusion of external independent dispute resolution practitioners (who have recognised external training in mediation) in the system as distinct from revenue authority staff acting as facilitators or mediators. However, as stated above, these modifications would be dependent on further confirmatory research being conducted.

The interview findings in chapter 7 do, however, indicate two areas where the majority of the participants provided strong levels of support. These are that the majority of the participants identified DSD Principle 11, the system is fair and perceived as fair, as the most important principle and that the majority of the participants thought that the dispute resolution system should recognise the different ethnic backgrounds of taxpayers particularly in the delivery of the tax dispute resolution system (that is, how the system is carried out). The latter finding supports the existing incorporation of the provision of forms and guides in different languages and a choice of access persons for non-English speaking taxpayers within DSD Principle 7. In addition, as noted above, the interview findings indicated that some of the interview participants found the numerical ranking of the principles in order of importance somewhat arbitrary. A number of participants suggested various ways in which to group or categorise the principles as a potentially more useful way of arranging the principles. Accordingly, based on

the various categorisations put forward by the interview participants, the researcher suggests the following categorisation of the tax DSD principles as outlined in Table 8.2:¹

Table 8.2: Suggested Categorisation of the Tax Dispute Systems Design Principles

High-level Purposive Principle: -The system is fair and perceived as fair (11)
Dispute Prevention Principle: -There is notification before and feedback after the resolution process (4)
Dispute Process Delivery Principles: -The system has multiple options for addressing conflict including interests, rights and power-based processes (2) -The system provides for loops backward and forward (3) -Procedures are ordered from low to high cost (6) -The system has multiple access points (7) -Taxpayers have the right to choose a preferred process (10)
Dispute Process Administration Principles: -The system has an internal person or unit that functions as a mentor and advisor for revenue authority staff (5) -The system includes training and education for stakeholders (8) -Assistance is offered for choosing the best process (9) -The system is supported by senior revenue authority members (12) -The system is aligned with the mission, vision and values of the organisation (13)
Dispute Process Consultation Principles: -Stakeholders are included in the design process (1) -There is evaluation of the system (14)

The above categorisation of DSD principles has been suggested on the basis that it reflects the aforementioned finding that fairness was viewed as the overarching principle. Hence, DSD Principle 11 has been categorised as the High-level Purposive Principle. In addition, the suggested categorisation of DSD principles also recognises the different ethnic backgrounds of taxpayers as part of the delivery of the tax dispute resolution system in the respect that DSD Principle 7, which provides for multiple forms of access to the system for ethnic and other types of taxpayers, is categorised as a Dispute Process Delivery Principle.

The suggested categorisation further reflects the general observation in the rankings provided by the participants (in chapter 7, section 7.3.4 of this thesis), that the principle of fairness and the principles relating to taxpayer choice and to stakeholder involvement in the design process were typically ranked or grouped higher than (and distinct from) the principles relating to taxpayer assistance and other revenue authority administrative-type principles. Hence, as

¹ The original numbers of the tax DSD principles (as they occur in Table 8.1 of this chapter) are given in brackets alongside the DSD principles.

shown in Table 8.2, the taxpayer assistance and administrative-type principles have been grouped together under Dispute Process Administration Principles as a distinct category of principles.

8.3 Data Analysis and Interview Findings – The Tax Dispute Systems Design Principles in the New Zealand Context

The following subsections discuss the interview findings on the tax DSD principles in the NZ context, namely with regard to changes to the ranking of the tax DSD principles in the NZ context (section 8.3.1), modifications, additions and deletions to the principles for NZ (section 8.3.2) and issues in applying the tax DSD principles in the NZ context (section 8.3.3).

8.3.1 Changes to the ranking of the dispute systems design principles in the New Zealand context

Except for 2 tax participants, the majority (26) of the interview participants made no changes to their rankings (or groupings) of the 14 DSD principles in the context of the NZ tax dispute resolution procedures.² This appeared to be because most of the participants had ranked the DSD principles with the NZ tax dispute resolution system primarily in mind:

I think I have very much thought about it in the New Zealand context because that is the only one I know.

(ADR Practitioner 1)

I'm sure there are other processes overseas which are better, there's probably not that many that are worse, maybe there aren't, but the overall principles that you would use shouldn't change, I wouldn't have thought.

(Tax Practitioner 4)

I've ranked them based on my understanding and knowledge of the New Zealand resolution procedures. So I probably wouldn't change them.

(Tax Practitioner 5)

My only experience with tax law is with the New Zealand tax system so I don't have any basis for comparison. So my answers for questions one through to four were actually given in the background context of the New Zealand tax system because I haven't ... had any other experience with any other jurisdiction to be able to answer that question.

(Tax Practitioner 6)

² As noted in chapter 7, section 7.3.4 of this thesis, the two members of the judiciary were not asked to rank the 14 DSD principles. Accordingly, the question of whether they would make any changes to their ranking of the DSD principles in the NZ context was also not applicable to these two interview participants.

The above responses reflect a limitation in the interview findings arising from the fact that the participants interviewed were all NZ stakeholders and thus, had primarily based their responses in the NZ context as it was the only one of which they had knowledge. However, even in cases where participants did have some knowledge of the tax dispute resolution procedures in other jurisdictions, their responses were essentially the same:

I'm relatively familiar with the New Zealand disputes regime and I have an overview of overseas regimes, but I am assuming that dispute resolution principles are applicable generally across jurisdictions and ideally across different areas of law.

(Tax Academic 2)

I've done some work and looked at the some of the Australian stuff but not in any detail ... But I probably ... ranked them based on my understanding and knowledge of the New Zealand resolution procedures. So I probably wouldn't change them.

(Tax Practitioner 5)

Thus, it appears that the participants' ranking of the DSD principles potentially could apply universally across different jurisdictions. However, further research on the ranking of the DSD principles conducted in overseas jurisdictions would be necessary in order to confirm this. Nevertheless, as indicated in chapter 7, section 7.3.1 of this thesis, some of the ADR participants, in particular, felt that they did not have enough knowledge and/or experience with the NZ tax dispute resolution procedures in order to provide a response:

I've got no idea because ... I have got no experience of the tax processes and procedures. I mean, somebody who has used them would be the best person to answer that question.

(ADR Practitioner 3)

Looking at [questions] five, six and seven, I do feel that, you see I couldn't even tell you what the process is right now by which a taxpayer takes ... I don't know what the systems are so it would be quite wrong for me to engage in that conversation in five, six and seven, really.

(ADR Practitioner 5)

8.3.2 Modifications, additions or deletions to the dispute systems design principles in the New Zealand context

Similar to the responses received with respect to changes to the ranking of the DSD principles in the NZ context, the vast majority of the respondents (28) had no additional modifications, additions or deletions to make to the DSD principles in the NZ context:

I didn't think that New Zealand was really any different from other countries in terms of tax disputes that arise and that is why I thought they also applied to New Zealand. I

couldn't think of any special reason for New Zealand to have any modification of the principles.

(ADR Academic 1)

I think they are a good set of principles. I mean ... there's no New Zealand specific requirements. Some of them exist in our current regime and some of them we would be well advised to import, so I think its fine.

(Tax Practitioner 6)

I think the principles should be pretty universal. I think that ties in with the notion of fairness.

(Tax Academic 3)

I thought pretty hard about that, but I think the principles are probably going to work in any country and I didn't see anything New Zealand specific that would change my views.

(Inland Revenue Representative 1)

I probably wouldn't change them ... Again, just because of my comments ... in respect of this for the earlier questions, *I probably have been influenced by the New Zealand process and so they are sort of focussed at that anyway*. So I mean all those issues that I raised would perhaps confirm [that] I sort of focussed on looking through a New Zealand lens at those principles.

(Tax Practitioner 5) (emphasis added)

As indicated by the above comment, some of the responses received may have been due to the fact that participants had already based their responses to the earlier questions in the NZ context. Nevertheless, overall the responses indicate that the participants thought that the set of tax DSD principles did not require any NZ-specific modifications. Furthermore, some participants specifically noted that in relation to the NZ context, obligations under the Treaty of Waitangi were already inherent in the tax DSD principles:

I mean I think that you would pick up things like Treaty [of Waitangi] obligations and the like under all of the other headings, so I can't see anything that stands out.

(ADR Practitioner 6)

I mean the thing that comes to mind is, you know, oh, where is the Treaty of Waitangi in here? Well, I think the Treaty of Waitangi is consistent with all of this. It is one of those contextual factors that you would use as you interpret and understand [the principles].

(Tax Academic 3)

The 2 participants who suggested changes to the principles in the context of NZ both suggested that the principles should be modified to differentiate between small and large tax disputes:

One thing that you could add ... I do think that you need to differentiate between SMEs and other taxpayers. SMEs and individuals if you like, versus the large corporates. That should, in my view, come through a bit more because I do think that this question of being burnt off by the system often arises with the small ones.

(Inland Revenue Representative 2)

I still think the cost of conducting the dispute in some cases outweighs the amount of tax at issue and by definition that makes no sense ... I think that the options for dispute, or the procedures, should be proportionate to the cost of the dispute and at least initially that choice should be made by the taxpayer.

(Tax Academic 2)

Notably, these suggestions link back to the concerns highlighted in chapter 4, section 4.2.2 of this thesis, with respect to the effect of the NZ tax dispute resolution procedures burning off small taxpayers, mainly due to the length and cost of the procedures.

8.3.3 Issues in applying the tax dispute systems design principles in the New Zealand context

The interview participants raised a number of issues in applying the DSD principles in the context of the NZ tax dispute resolution procedures. Both the ADR and tax participants indicated that there would need to be a cultural change within Inland Revenue in order to apply the DSD principles. However, it was acknowledged that it would be difficult to persuade Inland Revenue to change the existing procedures:

I think that the attitude of the Tax Department is quite kind of dictatorial so there needs to be some kind of culture shift at least in the conflict resolution bit. Which isn't to say that they suddenly start giving away money, but it is to say that they might approach the process and the conflict differently, which is a culture shift.

(ADR Practitioner 2)

I would like to make a comment about principle 12 ... simply to underscore its importance ... So I think there would need to be a cultural change to implement the system you're talking about and that system would have to be supported right from the top.

(ADR Academic/Practitioner 2)

I just think that Inland Revenue, it has the wrong culture to accept something like this. Completely the wrong culture ... I can't see the current Inland Revenue accepting it.

(Tax Practitioner 3)

Yeah, I think the big problem is that the system at the moment works really well for Inland Revenue and so why would they change it? ... I think it is going to be really hard to persuade IRD to change it, because why would they?

(Tax Practitioner 4)

There also seems to be ... generally [a] reluctance from the IRD's perspective to involve non-IRD staff in any type of deliberative or facilitative role at any point through the disputes resolution process because they just don't want to let go of that control because they have a fear that there may be an outcome which is anti-Revenue at some part of the process.

(Tax Practitioner 6)

The ADR and tax participants also noted that some of the DSD principles which provided for the choice of multiple options and multiple entry points were inconsistent with the current system and thus, it would be difficult to import the degree of flexibility associated with them into the system:

I thought that principle numbers 3, 7 and 10, they require the system to be kind of flexible, so that you can move forwards or backwards, or that you can choose specific options with respect to resolving the dispute. *They require the flexibility of the system and from the way it looks at the moment the process is very linear* and so that does not offer much choice ... so I thought that those three principles are inconsistent with the current system.

(ADR Academic 1) (emphasis added)

Yeah, I think there will [be issues] because the current regime does not offer the sort of flexibility that sort of underlies some of the principles and it doesn't sort of import the element of taxpayer choice that we have here.

(Tax Practitioner 6)

I think that the key ones are probably 3 and 7. So that's your loops backward and forward and multiple access points. I think where the problem might be ... is implementing those in a formal sense. Because *it would give taxpayers many more options in how they engage in the process and I'm not sure the [Inland] Revenue would be comfortable with that.*

(Tax Practitioner 9) (emphasis added)

Some of the ADR and tax participants further identified potential practical issues in implementing the principles with respect to staff training and the resources available:

I guess the big general comment is ... that if they were to implement a successful dispute resolution system design ... it probably would mean a lot of training. It would mean a lot of people understanding how it works and why it works.

(ADR Practitioner 2)

The only issues I can think of is whether there are sufficient trained, qualified staff and resourcing of a project for long enough for people for it to become well practised.

(ADR Practitioner 4)

I mean obviously you are looking at something that's best practice, but it is just whether or not from a practical point of view, whether it will work and I guess it's just purely from a resourcing point of view ... *the costs involved in actually setting it up, I would have thought would be costly and having the necessary resources within IR* to come to be able to implement the system.

(Tax Practitioner 5) (emphasis added)

Strongly supporting a rights-based approach, one of the members of the judiciary expressed concerns in particular with respect to the use of interests-based processes in tax dispute resolution:

... [T]he difficulty is that to be fair to one taxpayer, you are meant to be fair to all taxpayers. So one of the problems with an interests-based approach is that you detract from that so instead of tax being paid as it falls due, you may get tax being paid as it's negotiated at the time between the taxpayer and the Commissioner reflecting interests that aren't those that underpin the tax system.

(Member of the Judiciary 1)

However, notwithstanding the above concern, as highlighted in the case studies in chapters 4 and 5 of this thesis, support for the use of interests-based processes in certain circumstances in tax dispute resolution can be found in overseas jurisdictions. For example, the Australian Taxation Office (ATO) states that, in practice, an interests-based ADR approach may be appropriate where it will:³

- achieve a quicker or cheaper resolution particularly when the cost of litigating is out of proportion to the possible benefits;
- narrow or clarify the facts and issues in dispute;
- minimise risks associated with evidentiary difficulties;
- facilitate a certain/ earlier payment of tax; or
- maintain or improve the relationship between the parties in dispute.

The Inland Revenue representatives and some of tax participants further identified that the application of ADR in the tax context differed from the application in the context of ordinary commercial disputes, given the Commissioner's care and management duty to collect the correct amount of tax, inter alia, having regard to increasing voluntary compliance and the consistent treatment of taxpayers:

³ Australian Taxation Office "Practice Statement Law Administration 2013/3: Alternative Dispute Resolution (ADR) in ATO Disputes" (2013) <<http://law.ato.gov.au/atolaw/view.htm?locid=PSR/PS20133/NAT/ATO>> (last accessed 7 November 2016) ["PS LA 2013/3"] at [8]. See also, HM Revenue and Customs *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in Large or Complex Cases* (3 April 2012) at 7-9.

One of the things I grapple with from time to time ... is the duty that Inland Revenue officers have to get tax correct, technically correct, yet to have care and management responsibilities. *How does one collect the highest net revenue over time and have regard to voluntary compliance of other people and that sort of thing?* When you balance, say, ADR or settlement options ... there is quite a fine line there on the broader impact on other people rather than necessarily a focus on a single dispute.

(Inland Revenue Representative 1) (emphasis added)

I do think that there is a difference between general disputes resolution and resolution processes used by government and that sort of *need for fairness and treating taxpayers consistently* so that you can't end up with an over-abundance of discretion by, say, the Commissioner of Inland Revenue in our case, as to how to run the process. *And that doesn't exist in the commercial setting where people can resolve disputes any way they want to*, so I definitely think there is a big difference.

(Inland Revenue Representative 2) (emphasis added)

... [P]articularly if we are talking about any determinative type of alternative dispute resolution, the IRD won't permit that because that's effectively usurping the Commissioner's primary goal and function which is to assess the correct amount of taxes and that is then being pushed to another party. So, I think that those strictures impact on applying general DSD principles to dispute resolution in *New Zealand* ... *It is not a commercial dispute between two contractually equal parties. Rather it's the taxpayer versus the state and the state's got an agenda here to maximise the tax take.*

(Tax Practitioner 6) (emphasis added)

However, as noted in chapter 1, section 1.1 of this thesis, there would be similar care and management issues arising in other jurisdictions such as Australia and the UK. Moreover, the Commissioner's care and management duty governs all methods of tax dispute resolution, not just ADR. Nevertheless, in the context of dispute resolution generally, there may be some disputes that are not appropriate for resolution through ADR, such as disputes in which there may be a public interest in the outcome or there is a precedent value in resolving a certain issue. This underscores the importance of having clear guidelines for when ADR may or may not be appropriate.⁴ Also, as highlighted in chapter 4, section 4.2.2 of this thesis, the use of certain forms of interests-based ADR processes, including facilitation and mediation, is further limited by the fact that both parties must consent to its use.

⁴ See, for example, Australian Taxation Office "PS LA 2013/3", above n 3, at [8]-[9]; HM Revenue and Customs, above n 3, at 7-12.

8.4 The Suggested Changes to the Tax Dispute Systems Design Principles in the New Zealand Context

As outlined in sections 8.3.1 and 8.3.2 above, the interview findings show that the majority of the participants made no changes to their ranking of the DSD principles and largely had no further modifications, additions or deletions to make to the principles in the context of NZ. Overall, these findings potentially indicate that the suggested modified tax DSD principles do not require any specific adaptation for the NZ tax dispute resolution procedures. Nonetheless, the participants identified a number of issues in applying the tax DSD principles in the context of the NZ tax dispute resolution procedures. These include that there would need to be a cultural shift in Inland Revenue with respect to dispute resolution and a shift towards allowing for greater flexibility in the tax dispute resolution procedures. Furthermore, the application of the tax DSD principles would potentially require a significant level of training and resources.

Against this background, the remainder of this section discusses the suggested modifications to DSD Principles 11 and 8 in the context of the NZ tax dispute resolution procedures. With respect to views on the current NZ tax dispute resolution procedures, in particular regarding facilitated conferences, the interview findings reveal that the tax practitioner participants thought that the current Inland Revenue facilitated conferences were generally a good feature of the procedures. However, it was acknowledged that there was room for improvement. In particular, a lack of consistency in the facilitated conferences was observed by some of the tax practitioner participants interviewed, as illustrated by the following comments:

I think as a general proposition they are a good thing ... *I question the degree of training that the facilitators are getting by Inland Revenue ...* and I say this on the fact that there is just *a huge variation between the performance and the role that facilitators take on* depending on who they are ... So I think the conference is good but I think it needs some work in terms of perhaps, the training that these people are getting and clarification of the role.

(Tax Practitioner 9) (emphasis added)

I haven't had direct experience myself ... anecdotally I've heard ones which rave, which basically say the facilitator was prepared to get involved and was in fact instrumental in getting a resolution and I've heard other scenarios where the facilitator doesn't appear to have moved things along at all. So I think *it is possibly mixed and I suspect that it's personal ... as to each facilitator.*

(Tax Practitioner 10) (emphasis added)

My experience has been quite broad with that. I have had some people that do an absolutely fantastic job and they do recognise that their role is independent and they do recognise that they are there to facilitate the conference and ... then I've also had situations where the

facilitator actually starts to take on Inland Revenue's views ... *So it can be really, really varied from fantastic to appalling.*
(Tax Practitioner 12) (emphasis added)

An Inland Revenue representative also indicated that the facilitated conference process could be improved with respect to the training of facilitators:

... [B]ut if there was anything specific you could do? Possibly something like negotiation skills, [that] sort of training. I think that ... maybe they need to actually have the certificate that shows the general public that they have actually got the skills.
(Inland Revenue Representative 2)

As noted in chapter 4, section 4.2.2 of this thesis, all Inland Revenue facilitators receive two days of initial training from the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) for the facilitation role. However, effective from the latter half of 2015 (and subsequent to the conduct of the interviews with the NZ stakeholders in this study), Inland Revenue commenced accreditation of its facilitators with AMINZ Associate membership.⁵ Accordingly, it remains to be seen what effect, if any, the additional AMINZ accreditation of Inland Revenue facilitators will have on the consistency in the role and performance of the facilitators.

Nevertheless, Inland Revenue believe that the AMINZ accreditation of its facilitators will "provide greater external assurance as to the expertise of the facilitators used."⁶ However, in the researcher's view, issues with respect to perceptions of fairness of the facilitators and the facilitation process will still exist given that the facilitator remains as an Inland Revenue member of staff. In emphasising the overarching DSD principle of fairness, the interview findings in chapter 7, section 7.3.5.1 of this thesis suggest that the tax DSD principles could potentially be modified to incorporate external independent dispute resolution practitioners trained in mediation as distinct from revenue authority members of staff acting as facilitators. However, in the NZ context, this would arguably be difficult to implement given the issues identified in section 8.3.3 above with respect to Inland Revenue's reluctance to depart from its existing procedures and to solely utilise non-Inland Revenue staff in its conference facilitation process. Therefore, the researcher suggests that Inland Revenue could offer taxpayers the option of joint facilitation. That is, the option for taxpayers to engage a non-Inland Revenue co-facilitator to jointly facilitate alongside the existing Inland Revenue facilitator. The non-Inland Revenue co-facilitator would be selected by the taxpayer from a panel of accredited mediators administered by AMINZ, Resolution Institute and/or the New Zealand Law Society (NZLS). The mediators on the panel would have to meet a required level of training and

⁵ Email from [redacted] (Director, [redacted], Inland Revenue, Wellington) to Melinda Jone regarding Inland Revenue facilitator accreditation (22 January 2016).

⁶ Karen Whitiskie "Five years on for facilitated conferences (2015) 873 LawTalk 19 at 19.

expertise in tax in addition to being trained and accredited in mediation. As with the Inland Revenue facilitator, the non-Inland Revenue co-facilitator selected would have had no prior involvement in the tax dispute. If the taxpayer chooses the option of joint facilitation, the cost of the non-Inland Revenue co-facilitator would be met by the taxpayer. The above model generally follows the joint facilitation (or mediation) options currently available in the ADR programs of revenue authorities in overseas jurisdictions such as the UK and the US.⁷

The above recommendation for the option of joint facilitation does not provide for an external independent dispute resolution practitioner in replacement of the revenue authority facilitator in Inland Revenue's facilitated conferences as suggested by the interview participants. Nevertheless, it goes some way towards providing for the inclusion of an independent external party in the process. The limited prior research conducted in the NZ tax mediation context⁸ has shown the importance of an independent external party in enabling parties (in particular, taxpayers) to put their cases forward and "feel as if they have been heard."⁹ Furthermore, the experiences of overseas revenue authorities with joint facilitation suggests that a joint facilitation model may help to address some of the concerns with respect to the perceived fairness of solely using a revenue authority facilitator.¹⁰

The mediation literature also provides that, among other things, a legitimate reason for the use of co-mediation¹¹ is to achieve "more stable dynamics" between parties.¹² Co-mediation is less susceptible to dynamics where the mediator "directly or indirectly favours, or is perceived to favour, one party, or where a party tries to manipulate the mediator into supporting him or

⁷ See HM Revenue and Customs' (HMRC's) ADR program for Large or Complex Cases in the UK, documented in HM Revenue and Customs, above n 3 and the Internal Revenue Service's (IRS's) Post Appeals Mediation (PAM) program in the US, documented in Internal Revenue Service Rev. Proc. 2014-63, 2014-53 I.R.B. 1014 ["Rev. Proc. 2014-63"]. These programs are also outlined in section 1.3.2.1 of Appendix 1.3 and section 1.4.2.4 of Appendix 1.4 of this thesis, respectively.

⁸ While a number of studies have proposed the use of mediation in the NZ tax dispute resolution procedures, to the researcher's knowledge, Melinda Jone and Andrew J Maples "Mediation as an Alternative Option in New Zealand's Tax Dispute Resolution Procedures" (2012) 18 NZJTL 412 and Melinda Jone and Andrew J Maples "Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime" (2013) 19 NZJTL 301, are the only studies conducted to date which specifically examine, in-depth, the features of a proposed tax mediation regime in NZ.

⁹ Jone and Maples "Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime", above n 8, at 318.

¹⁰ Email from [redacted] (Partner in Tax Dispute Resolution, [redacted], London) to Melinda Jone regarding HMRC facilitation (7 May 2015); Email from [redacted] (Director, [redacted], London) to Melinda Jone regarding HMRC facilitation (27 May 2015). See also, Rachael Power "ADR: Handling SME v corporate cases" (26 February 2014) AccountingWEB.co.uk <<http://www.accountingweb.co.uk/blog-post/adr-handling-sme-vs-corporate-cases>> (last accessed 7 November 2016).

¹¹ While co-mediation generally refers to the use of two (or more) mediators, the same reasons for the use of co-mediation apply to joint facilitation.

¹² Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation: Principles, Process and Practice* (2nd ed, LexisNexis, Wellington, 2008) at 141 and Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation: Skills and Strategies* (LexisNexis, Wellington, 2015) at 254.

her.”¹³ It thus follows that achieving more stable dynamics is consistent with enhancing perceptions of fairness of the process. In addition, the mediation literature provides that another potential benefit of co-mediation is that it can allow for the “balancing of professional backgrounds.”¹⁴ That is, where a specific professional background or experience may be needed for a particular dispute, co-mediation can allow for one mediator to be skilled in the mediation process and the other to be experienced in the subject-matter of the dispute.¹⁵ Such an arrangement may be particularly beneficial in the context of complex tax disputes.

It is not the purpose of this study to make recommendations for a wholesale reform to the NZ tax dispute resolution procedures. While it is acknowledged that a shift in the dispute resolution culture of Inland Revenue would be both beneficial and desirable (albeit difficult in practice),¹⁶ arguably the introduction of the option of engaging an independent non-Inland Revenue co-facilitator would not require a radical departure from (or reform to) Inland Revenue’s existing procedures in order to gain a potential improvement in perceptions of fairness. In addition, the above recommendation is not only broadly in line with the existing ADR programs of revenue authorities in overseas jurisdictions, but it also follows on from suggestions by various stakeholders in NZ for the involvement of external mediators in the dispute process dating back to the joint submission by the NZLS and the former New Zealand Institute of Chartered Accountants (NZICA) in 2008.¹⁷ It should be noted that, while the suggestion for the use of external mediators has been made by various commentators and submitters to Inland Revenue (and albeit declined), the joint presence of Inland Revenue facilitators and external independent mediators has, to date, never been formally considered by Inland Revenue.¹⁸

Nevertheless, the researcher notes that even if the above recommendation was adopted by NZ policymakers and Inland Revenue, public and professional confidence in the independence and expertise of both Inland Revenue facilitators and non-Inland Revenue external mediators would take time to develop and become embedded in the system. Consequently, the public trust

¹³ Boulle, Goldblatt and Green *Mediation: Principles, Process and Practice*, above n 12, at 141.

¹⁴ Boulle, Goldblatt and Green *Mediation: Principles, Process and Practice*, above n 12, at 141 and Boulle, Goldblatt and Green *Mediation: Skills and Strategies*, above n 12, at 254.

¹⁵ Boulle, Goldblatt and Green *Mediation: Principles, Process and Practice*, above n 12, at 141 and Boulle, Goldblatt and Green *Mediation: Skills and Strategies*, above n 12, at 254.

¹⁶ Contrast with the ATO’s apparent embracement of a dispute resolution culture in particular as part of its “Re-inventing the ATO” transformation project: see chapter 4, section 4.2.3 of this thesis, referring to DSD Principle 12. See also, Australian Taxation Office “Reinventing the ATO” (16 September 2016) <<https://www.ato.gov.au/About-ATO/About-us/Reinventing-the-ATO/>> (last accessed 7 November 2016).

¹⁷ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, August 2008) at [3.14(a)].

¹⁸ Email from [redacted] (Director, [redacted], Inland Revenue, Wellington) to Melinda Jone regarding Inland Revenue facilitation (12 May 2015).

needed to foster enhanced voluntary compliance could take some time to emerge following the adoption of any such recommendation.

8.5 Summary

This chapter has outlined the suggested tax DSD principles based on the suggested modifications derived from the interview findings in chapter 7 of this thesis. The suggested changes to the set of tax DSD principles are the possible modification of DSD Principles 11 and 8 to take into account the inclusion of external independent dispute resolution practitioners (which are qualified in mediation) in the system as distinct from revenue authority staff acting as facilitators or mediators. Thus, given the limitations of the interview findings, namely the small frequencies of participants suggesting changes to the principles, the set of tax DSD principles initially developed (excepting of DSD Principles 11 and 8) has largely remained unchanged.

In addition, this chapter has suggested the possible grouping or categorisation of the 14 tax DSD principles into the following categories of principles: High-level Purposive, Dispute Prevention, Dispute Process Delivery, Dispute Process Administration and Dispute Process Consultation. This suggested categorisation emerges from the finding that some of the interview participants found the numerical ranking of the 14 DSD principles in order of importance somewhat arbitrary and thus, considered that the broad grouping of the principles was more meaningful.

The chapter then provided a discussion of the interview findings on the tax DSD principles in the NZ context. The majority of the participants made no further suggestions for changes to the tax DSD principles, or to their ranking, in the context of the NZ tax dispute resolution process. Overall this potentially indicates that the set of suggested tax DSD principles (provided in Table 8.1) do not require adaptation specifically for NZ. However, this may in part be due to the fact that the sample of participants interviewed was solely from NZ and therefore, had by default based their responses to the earlier questions in the context of their knowledge of the NZ tax dispute resolution procedures. Thus, future research is necessary in order to ascertain whether the tax DSD principles are universally applicable across different jurisdictions without the need for any country-specific modifications. Nevertheless, a number of issues were identified by participants in applying the tax DSD principles in the NZ context including that a shift in the dispute resolution culture of Inland Revenue and in its flexibility in providing dispute resolution options, would be necessary.

Applying the suggested modifications to DSD Principles 11 and 8 in the context of the NZ tax dispute resolution procedures, the researcher recommends the inclusion of the option within the current procedures for taxpayers to engage an external independent co-facilitator to jointly

facilitate alongside the existing Inland Revenue facilitator in Inland Revenue's facilitated conferences. In the researcher's view, this option arguably provides a compromise between the importance of enhancing the fairness of the tax dispute resolution procedures and Inland Revenue's apparent hesitance to depart from its existing dispute resolution culture and procedures.

The final chapter which follows presents an overview of the research, discusses the key findings, implications and limitations of the study, and makes recommendations for future research.

Chapter 9: Conclusions, Contributions, Limitations and Future Research

9.1 Introduction

The purpose of this final chapter is to provide an overview of the study, summarise the research findings, outline the contributions, limitations and areas for future research, as well as provide the concluding comments on the study. Accordingly, this chapter is organised as follows. Section 9.2 provides an overview of the study, with section 9.3 presenting a summary of the research findings. Section 9.4 outlines the contributions of the study to the literature and to the fields of tax dispute resolution and dispute systems design (DSD). Limitations of the study and potential areas for future research are identified in section 9.5 and section 9.6, respectively. Lastly, section 9.7 provides some concluding remarks.

9.2 Overview of the Research

To date, tax dispute resolution systems have not been evaluated extensively using DSD principles. Thus, the purpose of this study has been to develop the application of DSD principles in the particular context of tax dispute resolution. This study has been set against the background of a number of revenue authorities, including the Australian Taxation Office (ATO) and HM Revenue and Customs (HMRC), having in recent years implemented various interests-based alternative dispute resolution (ADR) processes as a means of managing and resolving disputes with taxpayers. The incorporation of these interests-based dispute resolution processes has formed part of the movement by various revenue authorities towards adopting more collaborative working approaches which are aimed at building and maintaining strong compliance relationships with taxpayers. This is particularly important in the context of self-assessment tax systems which are generally built on the cornerstone of voluntary compliance.

A number of models and principles for designing and implementing dispute resolution systems have been developed by various DSD practitioners beginning with the work of Ury, Brett and Goldberg in 1988.¹ However, the DSD literature indicates that to date, there has been limited testing of the models proposed and moreover, there have been no DSD frameworks which have been developed for the purpose of evaluating (tax) dispute resolution systems. Accordingly, through conducting comparative case studies of New Zealand (NZ), Australia, the United Kingdom (UK) and the United States (US), this study has evaluated (utilising 14 DSD principles drawn from the literature) and compared the effectiveness of the design of the tax dispute resolution systems of these jurisdictions. Based on the findings from the comparative case studies, a set of tax DSD principles has been developed.

¹ William L Ury, Jeanne M Brett and Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, Cambridge, MA, first published 1988, 1993 ed).

It was intended that the tax DSD principles derived could be adapted by tax administrations and used in either developing new or improving existing tax dispute resolution systems from a DSD perspective. Hence, external feedback on the tax DSD principles developed was sought through 30 semi-structured interviews conducted with stakeholders in NZ including: tax practitioners, tax academics, ADR practitioners, ADR academics, Inland Revenue representatives and members of the judiciary. The interview findings were used to suggest modifications to the set of tax DSD principles developed and also to consider whether adaptation of the tax DSD principles was required in the particular context of the NZ tax dispute resolution procedures.

9.3 Summary of Findings

This section provides a summary of the main findings of this study in relation to the three research questions outlined in chapter 1, section 1.3 of this thesis.

9.3.1 Research Question 1

How do the designs of the tax dispute resolution systems of NZ, Australia, the UK and the US compare when they are evaluated using DSD principles?

When the four jurisdictions' tax dispute systems are evaluated and compared from a DSD perspective, it appears that the strengths of the dispute resolution systems of the UK and the US lie in particular aspects of DSD relating to the structure of the system, while the strengths of the Australian system largely lie in certain aspects relating to the support and championship of the system. The NZ system displays some deficiencies in both areas.

The case study findings indicate that the UK and the US both lead the four jurisdictions in terms of meeting most of the DSD principles of best practice identified in the DSD literature. Key structural features of the two systems include that they generally have multiple entry points and thus, offer taxpayers the option to choose a preferred process from the outset of disputes. They also provide the ability for taxpayers to loop-forward to litigation and therefore, by-pass the revenue authority's internal review process. However, it appears that the tax dispute resolution systems in the UK and the US are both deficient in the visible support of the dispute resolution system by certain senior revenue authority members, namely HMRC's Executive Chair and Chief Executive, and the Internal Revenue Service (IRS) Commissioner, respectively. In addition, the integration and promotion of ADR within the dispute resolution systems of both jurisdictions could arguably also be strengthened.

In comparison, in Australia there is a high level of support by senior members of the ATO for the use of ADR, where appropriate, generally at any stage in the Australian tax dispute

resolution procedures. Furthermore, the approach of the ATO towards dispute resolution and ADR, outlined in its Disputes Policy and Dispute Management Plan, aligns with the overall mission, vision and values of the organisation. Nevertheless, the Australian dispute resolution system has only one structural entry point. Therefore, there is no option for taxpayers to choose a preferred process (that is, internal review or external appeal) at the outset of a tax dispute. As a result, there is no loop-forward mechanism that allows parties to by-pass the internal review process and proceed directly to a tribunal or court.

The NZ tax dispute resolution system is the worst placed of the four jurisdictions in terms of the number of DSD principles met. The prescribed system does not offer multiple structural entry points and in general, there are limited opportunities available for taxpayers to choose a preferred path in the procedures. In addition, there is limited visible support of the system by the Commissioner of Inland Revenue (NZ Commissioner). Notwithstanding the recognition by the Richardson Committee (which first proposed the current procedures) that the fair and expeditious resolution of disputes has wider impacts for the tax administration and on voluntary compliance,² prima facie, there appears to be no clear alignment of the purpose of the dispute procedures under s 89A Tax Administration Act 1994 (TAA 1994) with the overall the mission, vision and values of Inland Revenue. Furthermore, Inland Revenue are currently apparently not prepared to entertain the further use of ADR in the dispute procedures beyond the option of conference facilitation.

The case studies also illustrate that the following DSD principles are common to all four jurisdictions: stakeholders are included in the design process; there are multiple options for addressing conflict; certain loop-back mechanisms are provided; there is notification before and feedback after the dispute resolution process; forms of training and education are available for stakeholders; assistance is offered for choosing the best process; and there is evaluation of the system. There is an internal person or unit that functions as a mentor and advisor on ADR for revenue authority staff in all four jurisdictions. However, with the exception of the Taxpayer Advocate Service (TAS) within the IRS, generally there is no equivalent person or unit within the revenue authority which functions as a mentor and advisor on ADR for taxpayers. Except for NZ, the procedures of the four jurisdictions' dispute resolution systems are ordered from low to high cost (notwithstanding that high upfront costs are generally likely to be incurred by taxpayers with tax disputes).

Lastly, in all four jurisdictions some indications of negative perceptions of fairness of the operation of the jurisdictions' tax dispute resolution procedures are generally evident. In part this is due to the imbalance between the revenue authority and taxpayers in dispute in terms of resources and knowledge. This has resulted in the 'burning off' of (small) taxpayers noted, in

² Organisational Review Committee *Organisational Review of the Inland Revenue Department Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* (Wellington, 1994) at [10].

particular, in NZ and Australia. In addition, in all four jurisdictions there are mixed findings with respect to perceptions of fairness on the use of revenue authority staff acting as facilitators in the ADR programs of the four jurisdictions' revenue authorities. Nevertheless, as indicated in the interviews (see chapter 7, section 7.3.2 of this thesis) and also supported by the literature,³ the mere presence of negative taxpayer perceptions of fairness is significant given the potential impact on the overall integrity of the dispute resolution system (and consequently, the tax system as a whole and voluntary compliance).

9.3.2 Research Question 2

What general guidance in DSD principles in the context of tax dispute resolution can be derived from the DSD evaluations conducted in RQ 1 and the feedback from the interviews?

The DSD evaluations of the four jurisdictions' tax dispute resolution systems indicate that the set of 14 DSD principles drawn from the DSD literature in chapter 2 (see Table 2.2) can generally be applied in the context of tax dispute resolution without significant substantive modification. In deriving the set of 14 tax DSD principles in chapter 6 (see Table 6.2), modifications were made to the 14 DSD principles in order to give them more relevance in the tax dispute resolution context. However, for the majority of the principles the only modifications made were the provision of examples of the DSD principle applied in the context of tax dispute resolution. Additional explanation pertaining to the ordering of the procedures from low to high cost in DSD Principle 6 was also provided through including the exceptions that high upfront costs are generally likely to be incurred by taxpayers in tax disputes and that the additional use of ADR can add additional costs at the stage of the formal dispute procedures at which it is utilised. The only substantive change to the set of original DSD principles was the change in the wording of DSD Principle 5, which was modified to reflect the inclusion of an internal person or unit that acts as a mentor and advisor on ADR techniques for revenue authority staff, rather than for both disputants in the original context of organisational disputes.

The feedback obtained from the interviews conducted with the selected NZ stakeholders (tax practitioners, tax academics, ADR practitioners, ADR academics, Inland Revenue representatives and members of the judiciary) was unable to provide sufficient evidence to justify any concrete changes to the tax DSD principles developed from the case studies. This was due to the small frequencies of participants suggesting particular changes to the tax DSD principles (with the majority expressing no view). It was unknown whether the participants

³ See, for example, Betty R Jackson and Valerie C Milliron "Tax Compliance Research: Findings, Problems, and Prospects" (1986) 5 J Acct Literature 125; Maryann Richardson and Adrian J Sawyer "A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects" (2001) 16(2) ATF 137; and James Peck and Andrew J Maples "Comment: The Tax Disputes Resolution Process in New Zealand: What about the Little Fellas?" (2010) 16 NZJTL 348.

who provided no view on the changes (that is, modifications, additions or deletions) which were suggested by other participants would have done so had they been made aware of them. Thus, the interview findings were limited to providing suggestions for changes to the tax DSD principles only. As shown in Table 8.1 in chapter 8 of this thesis, the suggested changes to the set of tax DSD principles from the interview findings are the possible modification of DSD Principles 11 and 8 in order to take into account the inclusion of external independent dispute resolution practitioners (which are qualified in mediation) in the system, as distinct from revenue authority staff acting as facilitators or mediators. These suggested changes emerge from the view put forward by some of the interview participants that, in order for the system to be fair and perceived as fair, the dispute resolution practitioner must be independent and not be an employee of either side. This view is consistent with the limited prior tax mediation research conducted in NZ.⁴ However, the suggested changes conflict with the current practice of revenue authorities, both in NZ and overseas, whereby revenue authority staff are utilised as facilitators in their various internal facilitation programs. Accordingly, the suggested changes to the tax DSD principles may only be confirmed or refuted through further research being undertaken which solicits the views of major stakeholder groups, both in NZ and overseas. Furthermore, it was unclear from the interview findings whether the facilitator or mediator should firstly be trained and qualified in dispute resolution or in tax given that not all participants were asked this. Hence, further research is also necessary in order to ascertain this aspect.

The majority of the interview participants regarded DSD Principle 11, the system is fair and perceived as fair, as the most important or overarching DSD principle. As indicated in chapter 7, section 7.3.2 of this thesis, fairness was generally associated with the fairness of the procedures rather than, *inter alia*, fairness of the substantive outcome of the dispute. Moreover, the rationale indicated by the different types of participants for regarding fairness as the most important principle, reflected their respective backgrounds. The ADR participants generally believed fairness was important in achieving buy-in and participation by users of the system. The tax and Inland Revenue participants perceived fairness as being vital to the overall integrity of the tax system and achieving voluntary compliance. The members of the judiciary associated fairness with taxpayers having the ability to have their dispute determined in court at any stage of the dispute process.

Furthermore, when asked, the majority of the interview participants, were able to provide a numerical ranking of the 14 principles in order of importance from highest to lowest. The rankings provided broadly indicated that the principles regarding fairness, taxpayer choice and stakeholder involvement in the design process were typically ranked highest. These were

⁴ See Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime” (2013) 19 NZJTL 301 at 314.

generally followed by the principles relating to taxpayer assistance. The administrative-type principles relating to the revenue authority and its staff were typically ranked as least important. Nevertheless, some of the participants found the ranking exercise arbitrary and felt that all of the DSD principles were important for any given dispute resolution system. Hence, a number of participants suggested that providing some form of categorisation of the principles was potentially more helpful than a precise ranking of the principles. Accordingly, based on the categorisations suggested in the interviews, this study suggests the possible categorisation of the 14 tax DSD principles into the following categories of principles (as outlined in Table 8.2 in chapter 8): High-level Purposive, Dispute Prevention, Dispute Process Delivery, Dispute Process Administration and Dispute Process Consultation. The above categories (and the DSD principles within the categories) are not ranked in any order. However, consistent with the interview findings on fairness, the High Level Purposive category (containing DSD Principle 11) is regarded as overarching.

The interview findings also indicated that the majority of the participants thought that the tax dispute resolution system should recognise the different ethnic backgrounds of taxpayers in the delivery of the system as opposed to being recognised as a separate design principle per se. Although, these findings may possibly be limited in the respect that they represent the views of the predominantly NZ European ethnic group of participants which made up the stakeholders interviewed.

In summary, the case study findings indicate that the DSD principles drawn from the literature can generally be applied in the tax dispute resolution context with only one substantive modification being made to the set of principles. The interview findings suggest the potential modification of two of the tax DSD principles developed. However, further research is necessary in order to confirm or refute the modifications suggested to these principles.

9.3.3 Research Question 3

How can the general guidance in DSD principles in the context of tax dispute resolution (derived in RQ 2) be adapted in the context of the NZ tax dispute resolution procedures?

The interview findings show that the majority of the participants made no changes to their ranking of the tax DSD principles and largely had no further modifications, additions or deletions to make to the principles in the context of the NZ tax dispute resolution procedures. Overall this potentially indicates that the set of suggested tax DSD principles (derived in Research Question 2) do not require adaptation specifically for the NZ context. However, this may partly be due to the fact that the sample of participants interviewed was solely from NZ and therefore, had by default based their responses to the earlier questions in the context of their knowledge of the NZ tax dispute resolution procedures. It follows that future research

conducted in other jurisdictions would be necessary in order to ascertain whether the suggested DSD principles are universally applicable across different jurisdictions (in particular, common law jurisdictions) without the need for any country-specific modifications.

Nevertheless, a number of possible issues were identified by the interview participants in applying the tax DSD principles in the NZ context. These included that a change in the dispute resolution culture of Inland Revenue as well as a shift from the current prescribed linear dispute process towards providing more flexibility in dispute resolution options, would be necessary. Participants further identified that the implementation of the DSD principles would potentially require a significant level of staff training and resources.

Against the background of the above issues identified, the modifications to DSD Principles 11 and 8 suggested by the interview participants (as outlined above in section 9.3.2) were applied in the context of the NZ tax dispute resolution process. Consequently, this study recommends the inclusion of the option within the existing procedures for taxpayers to engage a non-Inland Revenue co-facilitator to jointly facilitate the current facilitated conference meetings with the existing Inland Revenue facilitator. Overseas experience, particularly in the UK, indicates that fairness perceptions may potentially be enhanced through the inclusion of the option for taxpayers to engage an external independent co-facilitator alongside the revenue authority facilitator.⁵ In addition, prior NZ tax mediation research has shown that the inclusion of an external independent party in the process is regarded as an important factor in enabling parties to put their cases forward and feel as if they have been heard.⁶ The above recommendation does not completely provide for the interview participants' suggested optimal solution of the utilisation of external independent mediators instead of Inland Revenue facilitators. However, in the researcher's view, it provides a compromise between the importance, as indicated by the interview participants, of achieving fairness of the tax dispute resolution procedures and Inland Revenue's current apparent reluctance to depart from its existing dispute resolution culture and procedures. Furthermore, the recommendation made provides a pragmatic option in the light of the potential cost and resources which would be required in establishing an adequate pool of external independent mediators appropriately trained and qualified in tax (to replace the current pool of Inland Revenue facilitators).

⁵ Email from [redacted] (Partner in Tax Dispute Resolution, [redacted], London) to Melinda Jone regarding HMRC facilitation (7 May 2015); Email from [redacted] (Director, [redacted], London) to Melinda Jone regarding HMRC facilitation (27 May 2015).

⁶ Jone and Maples, above n 4, at 318.

9.4 Contributions of the Research

In the researcher's view, this research has made a number of contributions to the literature and to the fields of taxation and DSD. These contributions are discussed below in sections 9.4.1 and 9.4.2, respectively.

9.4.1 Contributions to the literature

This study adds to the limited number of studies which utilise DSD principles in evaluating tax dispute resolution systems, namely, the studies conducted by Bentley⁷ and Mookhey⁸ which evaluate the Australian tax dispute resolution system. This research extends these prior studies by examining a larger number of countries outside of Australia and through utilising a more comprehensive range of DSD principles in the evaluations conducted. Furthermore, this study extends the research methods utilised by both Bentley and Mookhey beyond the use of single unit case studies. Through applying the research framework of pragmatism, in addition to utilising a multiple unit case study approach, this study employed semi-structured interviews in order to seek external feedback on the tax DSD principles derived. Moreover, in adopting the pragmatism research framework, the approach taken in this research ventures outside of the “dominance of positivist approaches in those areas where tax is accepted as a valid field of inquiry.”⁹

In addition, this study goes some way towards filling the gap identified in the DSD literature that further research is necessary in testing the DSD models and principles which have been developed by DSD practitioners and furthermore, that a DSD framework for analysing the effectiveness of the design of dispute resolution systems is needed.¹⁰ To the best of the researcher's knowledge, this study is one of the first studies which has been conducted in developing a framework of tax DSD principles. Therefore, this study provides a basis for further potential research (as discussed below in section 9.6) to be conducted in refining the framework of tax DSD principles suggested in this study.

This study also contributes to the related literature on tax mediation. In particular, in the NZ context, the finding from the interviews conducted with the NZ stakeholders which suggests

⁷ Duncan Bentley “Problem resolution: Does the ATO approach really work?” (1996) 6(1) Revenue LJ 17, updated in Duncan Bentley *Taxpayers' Rights: Theory, Origin and Implementation* (Kluwer Law International, The Netherlands, 2007) ch 5.

⁸ Sheena Mookhey “Tax dispute systems design” (2013) 11 EJTR 79.

⁹ Lynne Oats “Tax as a social and institutional practice” in Lynne Oats (ed) *Taxation: A Fieldwork Research Handbook* (Routledge, Milton Park, 2012) 3 at 5.

¹⁰ John P Conbere “Theory Building for Conflict Management System Design” (2001) 19 Conflict Resol Q 215; Maurits Barendrecht “In Search of Microjustice: Five Basic Elements of a Dispute System” (Tilburg University Legal Studies Working Paper No. 002/2009, 29 January 2009); William Roche and Paul Teague “Do Conflict Management Systems Matter?” (2012) 51 Hum Resource Mgmt 231.

that an external independent dispute resolution practitioner trained in mediation should be utilised in the system rather than a facilitator that is a revenue authority member of staff, supports the findings of Jone and Maples' study on a tax mediation regime for NZ.¹¹ In addition, given the findings in this study which emphasise the overarching DSD principle, that the system must be fair and perceived as fair, this study also contributes to the literature which examines the link between the fair treatment of taxpayers and voluntary tax compliance.¹²

9.4.2 Contributions to the fields of taxation and dispute systems design

The way tax disputes are resolved has wider impacts on the tax administration and consequently on voluntary compliance.¹³ Accordingly, this study has practical implications in the field of taxation in the respect that the suggested set of tax DSD principles could potentially be utilised by revenue authorities and tax policymakers around the world in either improving existing or developing new tax dispute resolution systems. An ultimate outcome of this research would be for the suggested tax DSD principles (following any refinements made) to be tested and applied by revenue authorities and policymakers in the real world. In the researcher's view the tax DSD principles suggested in this study could potentially be utilised in improving tax dispute resolution systems both in NZ and around the world, particularly as part of the movement of various revenue authorities from a core reliance on a "command and control" culture towards engaging in more collaborative working approaches with taxpayers.¹⁴ In the NZ context, the tax DSD principles suggested in this study could possibly be utilised in improving the tax dispute resolution system¹⁵ alongside Inland Revenue's current Business Transformation programme.¹⁶

It is not a purpose of this study to make suggestions for a wholesale reform of the NZ tax dispute resolution procedures. However, the particular recommendation made in section 8.4, chapter 8 of this thesis, for the inclusion of the option for taxpayers to engage an external

¹¹ See Jone and Maples, above n 4.

¹² See, for example, Martina Hartner, Silvia Rechberger, Erich Kirchler, and Alfred Schabmann "Procedural Fairness and Tax Compliance" (2008) 38 *Econ Analysis & Pol'y* 137; Kristina Murphy "The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders" (2004) 28 *Law & Hum Behav* 187; Kristina Murphy "Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance" (2005) 32 *J Law & Soc* 562.

¹³ Organisational Review Committee, above n 2, at [10].

¹⁴ Bentley *Taxpayers' Rights: Theory, Origin and Implementation*, above n 7, at 166. See also, Karen Stilwell "Mediation of Canadian Tax Disputes" (Master of Laws Thesis, University of Toronto, 2014) at 19.

¹⁵ See, for example, a possible recommendation for the option of mediation in the NZ tax dispute procedures (which was made following a DSD evaluation of the procedures) in Melinda Jone "Evaluating New Zealand's Tax Dispute Resolution System: A Dispute Systems Design Perspective" (2016) 22 *NZJTL* 228.

¹⁶ For further information, see Inland Revenue "Business transformation: About Business transformation" (6 September 2016) <<http://www.ird.govt.nz/transformation/about-business-transformation/about-business-transformation-index.html>> (last accessed 7 November 2016); Inland Revenue *Making Tax Simpler – Towards a New Tax Administration Act: A Government Discussion Document* (November 2015).

independent co-facilitator in Inland Revenue's current facilitated conference process, could potentially be an option which could be considered by Inland Revenue with a view to improving the NZ tax dispute resolution procedures and thereby, enhancing taxpayers' perceptions of fairness of the procedures. The recommendation made is not only broadly in line with the existing ADR programs of revenue authorities overseas such as HMRC and the IRS, but it also follows on from suggestions by various stakeholders in NZ for the involvement of external mediators in the NZ tax dispute resolution process dating back to the joint submission by the New Zealand Law Society (NZLS) and the former New Zealand Institute of Chartered Accountants (NZICA) in 2008.¹⁷ Moreover, representatives from Inland Revenue have acknowledged that their processes can always be improved.¹⁸ However, to date, the idea of the joint presence of Inland Revenue facilitators and external independent mediators has never been formally considered.

In relation to the field of DSD, given that to the researcher's knowledge, there have been no frameworks of DSD principles developed for evaluating the effectiveness of the design of dispute resolution systems generally, this study provides a basis for DSD practitioners to follow in building DSD best practice frameworks in other contexts outside of the field of taxation where dispute resolution systems are utilised. In particular, the suggested categories of High-level Purposive, Dispute Prevention, Dispute Process Delivery, Dispute Process Administration and Dispute Process Consultation, could possibly be utilised to categorise the DSD principles as applied in relevant non-tax contexts. Furthermore, the DSD framework developed in this study could be used in the teaching of DSD given that Smith and Martinez state: "dispute systems analysis is an essential skill in systems design, and one that we believe should be widely taught in law schools."¹⁹ The DSD framework developed in this study could potentially help students understand DSD in the following three contexts:²⁰

- (1) Analysing a system historically to understand its evolution, functioning, and impacts;
- (2) Advising on the best process to create the design, or more likely redesign, mechanism for a system; and
- (3) Designing (or redesigning) a system itself.

¹⁷ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, August 2008).

¹⁸ This was acknowledged in the interviews with Inland Revenue Representative 1 (24 March 2015) and Inland Revenue Representative 2 (30 March 2015).

¹⁹ Stephanie Smith and Janet Martinez "An Analytic Framework for Dispute Systems Design" (2009) 14 Harv Negot L Rev 123 at 125.

²⁰ At 124.

In addition to being taught in law schools, the DSD framework developed in this study could also be incorporated in the training and professional development of dispute resolution practitioners by dispute resolution professional bodies.

9.5 Limitations of the Research

Despite the potential contributions of this study, it also has some limitations which need to be considered when interpreting the findings. First, as acknowledged in chapter 1, section 1.1 of this thesis, the overall application of the tax DSD guidance developed (and of interests-based procedures) may be limited by the fact that in tax disputes the individual interests of the parties tend to be subsumed in the argument over legal rights. That is, the fundamental relationship between the parties in dispute is a legal one as opposed to one concerning the underlying needs and concerns (that is, interests) of the parties. It follows that a further limitation (although not unique to tax dispute resolution) is that interests-based processes generally require the consent and willingness from both parties in order for such processes to be utilised effectively.

Secondly, the tax DSD principles developed were derived from DSD evaluations conducted on four selected jurisdictions. Notwithstanding that the jurisdictions were primarily chosen due to the amount of information that was available on their ADR processes, the jurisdictions are all western common law countries. Therefore, the extent to which the findings of this study can be generalised to other countries, in particular non-western and non-common law countries, is unknown. Furthermore, as outlined in chapter 2, section 2.2.1 of this thesis, the four jurisdictions evaluated in this study all currently operate on a self-assessment basis for income tax which generally relies on voluntary taxpayer compliance. Consequently, the findings may not necessarily be generalisable to jurisdictions that do not operate systems and procedures based on the principles of self-assessment and voluntary compliance.

Thirdly, the DSD evaluations of the four jurisdictions were conducted on the tax dispute resolution procedures in place generally up until 30 November 2016. Therefore, the findings of this study reflect the DSD evaluations conducted on the procedures up until that particular point in time. Changes to the procedures and the broader legal, cultural and social environments within which the procedures operate may inevitably occur. In addition, the current modernisation and digitalisation regimes of many tax administrations around the world have led to changes to the way in which taxpayers self-assess (including, as noted in chapter 1, section 2.2.1 of this thesis, the greater pre-population of tax returns). These changes will ultimately transform taxpayers' interactions with tax authorities and, inter alia, may impact on the way in which tax disputes arise and also how they are resolved. Consequently, changes to the dispute resolution procedures may be necessary. Therefore, future DSD evaluations conducted on the four jurisdictions may potentially differ.

Fourthly, the initial set of DSD principles utilised in evaluating the dispute resolution systems of the four jurisdictions was limited to those drawn from the prior DSD literature as a result of a documentary analysis conducted by the researcher in chapter 2 of this thesis. It is possible that there may have been some DSD principles which could have been omitted by the researcher. However, the external feedback on the DSD principles developed should have identified any fundamental DSD principles potentially omitted.

Fifthly, the small sample size and purposive sampling method utilised for the interviews conducted in this research do not allow for generalisation to wider populations. However, qualitative studies are usually not designed to allow systematic generalisation to some wider population.²¹ Rather, the aim of the interviews was to gain rich and in-depth information from the participants on the tax DSD principles developed. The participants interviewed in this study were limited to the six stakeholder groups consisting of: tax practitioners, tax academics, ADR practitioners, ADR academics, Inland Revenue representatives and members of the judiciary. Moreover, the interview participants were limited to individuals who were willing and available to participate. The low response rate to the notices seeking interview participants issued by the selected professional bodies on behalf of the researcher meant that the majority of the ADR and tax practitioners were recruited as a result of being contacted directly by the researcher. The members of the judiciary which were ultimately recruited were also limited to those members that were personally contacted by the researcher. Furthermore, the views of the members of the judiciary were limited to the particular subset of tax disputes which they heard in their jurisdiction of the NZ court system. In addition, no policymakers were able to be interviewed given that, as noted in chapter 3, section 3.6.3 of this thesis, the relevant NZ policymaker contacted by the researcher was unavailable to participate.

Sixthly, the feedback obtained from the interviews reflects the views of stakeholders in NZ only. Most of the interview participants based their answers to the questions primarily in the context of the NZ tax dispute resolution system as this was the only system they had knowledge of. This was reflected in the finding that most of the interview participants made no changes to the tax DSD principles, or to their ranking, in the NZ context as they had already based their answers to the earlier questions in the context of NZ. Therefore, it is unknown to what extent the set of tax DSD principles would be applicable in other jurisdictions with tax dispute resolution systems different to NZ's.

Seventhly, the interview findings with respect to recognising the different ethnic backgrounds of taxpayers within the dispute resolution system were limited to the mainstream views of the predominantly NZ European participants interviewed. This was due to the limited number of

²¹ Joseph A Maxwell "Understanding and validity in qualitative research" in Michael Huberman and Matthew B Miles (eds) *Qualitative Researcher's Companion: Classic and Contemporary Readings* (Sage, Thousand Oaks, 2002) 37 at 52.

NZ stakeholders from non-NZ European ethnic backgrounds that were available and willing to be interviewed. However, while the ethnic groups of the participants interviewed do not reflect the distribution of ethnic groups in the NZ taxpayer population generally, it reflects the ethnic distribution of the major stakeholders in the tax dispute resolution system in NZ. Nevertheless, against the background of NZ becoming more culturally diverse, the issue of recognising ethnic taxpayers in the dispute resolution system could potentially be understated in this study.

Lastly, there are also limitations associated with the interview approach itself. As highlighted in the interview findings in chapter 7 and chapter 8 of this thesis, it is unknown whether the interview participants who provided no view on the modifications, additions and deletions to the tax DSD principles suggested by other participants would have done so had they been made aware of them. This limitation primarily arose as the interviews with the participants were conducted as single interview sessions with no follow-ups. Accordingly, the limitations identified in this section provide the basis for a number of areas for future research which are discussed in the next section below.

9.6 Areas for Future Research

This study sets a basis for future research to be conducted in evaluating and comparing the effectiveness of the design of the tax dispute resolution systems of jurisdictions beyond the four countries included in this study. However, as indicated in chapter 1, section 1.5 of this thesis, further research would be dependent on the amount of information available on the ADR processes utilised in the tax dispute resolution systems of other jurisdictions. Future studies could potentially be conducted in non-western countries (for example, China, India, Pakistan and the Philippines) and also in civil law European countries (for example, Belgium and the Netherlands) which utilise ADR processes in their tax dispute resolution systems. In addition, future research could be conducted on evaluating the designs of tax dispute resolution systems pertaining to types of tax disputes other than disputes arising from disagreements over a taxpayer's tax liabilities or entitlements (which were the type focused on in this study), such as disputes over collection actions.

This study has developed a set of tax DSD principles derived from case studies conducted on the tax dispute resolution systems in four jurisdictions. Feedback has been sought on the set of tax DSD principles developed through interviews with selected stakeholders in NZ. However, given the small frequencies of interview participants which suggested particular changes, there was insufficient evidence to justify any concrete changes to the tax DSD principles. Consequently, the findings of this study could only justify the making of suggestions for certain changes to the tax DSD principles. These include the modification of DSD Principles 11 and 8 to take into account the inclusion of external independent dispute resolution practitioners (which are qualified in mediation) in the system rather than revenue authority staff acting as

facilitators or mediators. In order to confirm or refute the suggested modifications, follow-up interviews could be conducted with the stakeholders interviewed in this study. However, given the small number of participants in each stakeholder group interviewed (as noted in section 9.5 above), additional research soliciting the views of a further number of participants from each of the stakeholder groups may also be required. This could be carried out through further interviews, focus groups and/or a survey questionnaire.

In addition, the views of other major stakeholder groups such as taxpayers that have been involved in tax disputes, revenue authority officers that have been involved in disputes, revenue authority facilitators (or other revenue authority staff which have a dispute resolution practitioner role) and relevant tax policymakers could potentially be sought. Moreover, feedback could be sought from the above stakeholder groups not only in NZ, but also in Australia, the UK and the US. This would also assist in determining whether the suggested DSD principles are generally applicable across different jurisdictions without the need for any country-specific modifications. As indicated in section 9.3.2 above, associated with the suggested modification of DSD Principles 11 and 8, further research could also be conducted in soliciting stakeholders' views on whether the external independent dispute resolution practitioner should foremostly be trained and qualified in dispute resolution or principally an expert in tax.

Future research could also further explore the issue of recognising the different ethnic backgrounds of taxpayers in the tax dispute resolution system given that this is likely to become a larger issue with the changing cultural demographics of NZ (and also in most other Organisation for Economic Co-operation and Development (OECD) countries). This research would provide a complement to prior research on ethnic taxpayers which has shown that some ethnic groups may have difficulties complying due to their cultural values.²² This requires tax authorities to be culturally sensitive and culturally aware, and to have in place targeted assistance and monitoring measures.²³ Thus, future research could involve attempting to seek feedback from stakeholders from a range of ethnic groups, both in NZ and overseas, in order to draw clearer conclusions on the particular role of DSD, if in fact any, in recognising ethnic taxpayers in the dispute resolution system.

As stated in section 9.4.2 above, an ultimate outcome of this research would be for the suggested tax DSD principles (following any further analysis and refinements made) to be tested and applied in practice by revenue authorities and policymakers in the real world. Based on this objective, albeit ambitious and notwithstanding the cost and resources required, future research could involve working with revenue authorities in utilising the tax DSD principles

²² Sue Yong "Tax Compliance and Small and Medium Enterprise Operators: An Intra-Cultural Study in New Zealand" (PhD Dissertation, Auckland University of Technology, 2011).

²³ At 171.

developed in pilot-testing a proposed tax dispute resolution system. This could initially be run alongside the revenue authority's existing system to enable the effectiveness of the two systems to be compared.

9.7 Concluding Remarks

This research has sought to contribute towards the development and application of DSD principles in the particular context of tax dispute resolution through conducting DSD evaluations of four jurisdictions' tax dispute resolution systems and subsequently developing guidance in tax DSD principles. While this study represents one of the initial studies in the area of tax DSD and is strongly based on a NZ perspective, this research has found that the overarching design principle which must be borne in mind in the design of any tax dispute resolution system is that the system must be fair and perceived as fair. Given the observation made by Richardson and Sawyer that: "favourable taxpayer perceptions of the fairness of the tax system are certainly preferable to negative assessments",²⁴ it is hoped that the findings of this study may ultimately be used by tax administrations in either improving their existing or developing new dispute resolution systems bearing this sentiment in mind.

²⁴ Richardson and Sawyer, above n 3, at 183.

Bibliography

1. Cases

1.1 New Zealand

Russell v Commissioner of Inland Revenue [2015] NZHC 2353.

2. Legislation

2.1 New Zealand

District Court Rules 2009.

District Court Rules 2014.

Education Act 1989.

Employment Relations Act 2000.

High Court Rules 2016.

Official Information Act 1982.

Tax Administration Act 1994.

Taxation (Tax Administration and Remedial Matters) Act 2011.

Taxation Review Authorities Act 1994.

Taxation Review Authorities Regulations 1998.

2.2 Australia

Administrative Appeals Tribunal Act 1975 (Cth).

Administrative Decisions (Judicial Review) Act 1977 (Cth).

Civil Disputes Resolution Act 2011 (Cth).

Federal Court of Australia Act 1976 (Cth).

Federal Court Rules 2011 (Cth).

Judiciary Act 1903 (Cth).

Legal Services Directions 2005 (Cth).

Public Governance, Performance and Accountability Act 2013 (Cth).

Income Tax Assessment Act 1936 (Cth).

Taxation Administration Act 1953 (Cth).

Tribunals Amalgamation Act 2015 (Cth).

2.3 United Kingdom

Civil Procedure Rules 1998 (Practice Direction – Pre-Action Conduct) (UK).

Commissioners for Revenue and Customs Act 2005 (UK).

Freedom of Information Act 2000 (UK).

Income and Corporation Taxes Act 1988 (UK).

Taxes Management Act 1970 (UK).

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK).

Tribunals, Courts and Enforcement Act 2007 (UK).

Welsh Language Act 1993 (UK).

2.4 United States

Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (1990).

Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

Internal Revenue Code of 1986.

Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998).

Tax Court Rules of Practice and Procedure.

Treasury Regulations.

3. Books and Chapters in Books

James Alm and Jorge Martinez-Vazquez “Institutions, paradigms, and tax evasion in developing and transition countries” in James Alm and Jorge Martinez-Vazquez (eds) *Public Finance in Developing and Transition Countries* (Edward Elgar Publishing, Cheltenham, UK and Northampton, MA, 2003) 147.

Earl A Babbie *The Practice of Social Research* (9th ed, Wadsworth Thomson Learning, Belmont, 2001).

Duncan Bentley *Taxpayers’ Rights: Theory, Origin and Implementation* (Kluwer Law International, The Netherlands, 2007).

Lisa B Bingham and Tina Nabatchi “Dispute System Design in Organizations” in William J Pammer and Jerri Killian (eds) *Handbook of Conflict Management* (Marcel Dekker, New York, 2003) 105.

Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation: Principles, Process and Practice* (2nd ed, LexisNexis, Wellington, 2008).

Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation: Skills and Strategies* (LexisNexis, Wellington, 2015).

Richard E Boyatzis *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage, California, 1998).

Valerie Braithwaite “Dancing with tax authorities: Motivational postures and non-compliant actions” in Valerie Braithwaite (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing, Aldershot, 2003) 15.

Alan Bryman *Social Research Methods* (3rd ed, Oxford University Press, Oxford, 2008).

CCH *Australian Master Tax Guide 2015* (56th ed, CCH, Sydney, 2015).

CCH *British Master Tax Guide 2014-15* (Wolters Kluwer, Kingston upon Thames, 2014).

CCH *US Master Tax Guide 2015* (98th ed, CCH, Chicago, 2014).

Cathy A Costantino and Christina S Merchant *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, San Francisco, 1996).

John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd ed, Sage, Thousand Oaks, 2003).

John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (4th ed, Sage, Thousand Oaks, 2012).

John W Creswell and Vicki L Plano Clark *Designing and Conducting Mixed Methods Research* (Sage, Thousand Oaks, 2007).

Robert Dubin *Theory Building* (Free Press, New York, 1978).

Roger Fisher, William L Ury and Bruce Patton *Getting to Yes: Negotiating Agreement Without Giving In* (3rd ed, Penguin, New York, 2011).

Peter Feuille “Grievance Mediation” in Adrienne E Eaton and Jeffrey H Keefe (eds) *Employment Dispute Resolution and Worker Rights in the Changing Workplace* (Industrial Relations Research Association, Champaign, 1999) 187.

Shelley Griffiths “Tax as Public Law” in Andrew J Maples and Adrian J Sawyer (eds) *Taxation Issues: Existing and Emerging* (Canterbury Education Printing Services, Christchurch, 2011) 215.

Terry Hutchinson *Researching and Writing in Law* (3rd ed, Thompson Reuters, Sydney, 2010).

Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH, Auckland, 2012).

Michael S Lewis-Beck, Alan Bryman, and Tim Futing Liao (eds) *The SAGE Encyclopedia of Social Science Research Methods* (Sage, Thousand Oaks, 2004).

Edgar A Lind and Tom R Tyler *The Social Psychology of Procedural Justice* (Plenum, New York, 1988).

Joseph A Maxwell “Understanding and validity in qualitative research” in Michael Huberman and Matthew B Miles (eds) *Qualitative Researcher's Companion: Classic and Contemporary Readings* (Sage, Thousand Oaks, 2002) 37.

Doreen McBarnet “When compliance is not the solution but the problem: From changes in law to changes in attitude” in Valerie Braithwaite (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate Publishing, Aldershot, 2003) 229.

Margaret McKerchar *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Pyrmont, 2010).

Victor Minichiello, Rosalie Aroni and Terrence Hays *In-depth Interviewing: Principles, Techniques, Analysis* (3rd ed, Pearson Education, Sydney, 2008).

William L Neuman *Social Research Methods: Qualitative and Quantitative Approaches* (4th ed, Allyn and Bacon, Boston, 2000).

Lynne Oats “Tax as a social and institutional practice” in Lynne Oats (ed) *Taxation: A Fieldwork Research Handbook* (Routledge, Milton Park, 2012) 3.

Michael Q Patton *Qualitative Research and Evaluation Methods* (3rd ed, Sage, Thousand Oaks, 2002).

Colin Robson *Real World Research: A Resource for Social Scientists and Practitioner-Researchers* (Blackwell, Oxford, 1993).

Nancy H Rogers, Robert C Bordone, Frank EA Sander and Craig A McEwen *Designing Systems and Processes for Managing Disputes* (Wolters Kluwer, New York, 2013).

Kathryn Roulston *Reflective Interviewing: A Guide to Theory and Practice* (Sage, Thousand Oaks, 2010).

Mary P Rowe “Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?” in Sandra Gleason (ed) *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (Michigan State University Press, East Lansing, 1997) 79.

Mary P Rowe and Corinne Bendersky “Workplace Justice, Zero Tolerance and Zero Barriers” in Thomas A Kochan and David B Lipsky (eds) *Negotiations and Change: From the Workplace to Society* (Cornell University Press, Ithaca, 2003) 117.

Michael Salter and Julie Mason *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education, Harlow, 2007).

Sotoirios Sarantakos *Social Research* (Macmillan Education, Melbourne, 1993).

Mark Saunders, Philip Lewis P and Adrian Thornhill *Research Methods for Business Students* (5th ed, Prentice Hill, Harlow, 2009).

Karl A Slaikeu and Ralph H Hasson *Controlling the Costs of Conflict: How to Design a System for Your Organization* (Jossey-Bass, San Francisco, 1998).

Tania Sourdin *Alternative Dispute Resolution* (4th ed, Thomson Reuters, Sydney, 2012).

The Laws of Australia (2013) vol 13(6) Dispute Systems Design.

Victor Thuronyi *Comparative Tax Law* (Kluwer Law International, The Hague, 2003).

Tom R Tyler *Why Citizens Obey the Law: Procedural Justice, Legitimacy and Compliance* (Yale University Press, New Haven, 1990).

Tom R Tyler and Steven L Blader *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement* (Psychology Press, Philadelphia, PA, 2000).

William L Ury, Jeanne M Brett and Stephen B Goldberg *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, Cambridge, MA, first published 1988, 1993 ed).

Robert K Yin *Case Study Research: Design and Methods* (5th ed, Sage, Thousand Oaks, 2014).

4. Journal Articles

Jashim U Ahmed “Documentary Research Method: New Dimensions” (2010) 4 Indus Journal of Management & Social Sciences 1.

James Alm, Todd Cherry, Michael Jones and Michael McKee “Taxpayer information assistance services and tax compliance behavior” (2010) 31 Journal of Economic Psychology 577.

James Alm and Benno Torgler “Do Ethics Matter? Tax Compliance and Morality” (2011) 101 Journal of Business Ethics 635.

Duncan Bentley “Problem resolution: Does the ATO approach really work?” (1996) 6(1) Revenue Law Journal 17.

Jane T Bertrand, Judith E Brown and Victoria M Ward “Techniques for Analyzing Focus Group Data” (1992) 16 Evaluation Review 198.

Lisa B Bingham “Control Over Dispute-System Design and Mandatory Commercial Arbitration” (2004) 67 Law and Contemporary Problems 221.

Lisa B Bingham “Designing Justice: Legal Institutions and Other Systems for Managing Conflict” (2008) 24 Ohio State Journal on Dispute Resolution 1.

Greg Blanchard “The Case for a Simplified Tax Dispute Resolution Process” (2005) 11 New Zealand Journal of Taxation Law and Policy 417.

Glenn A Bowen “Naturalistic inquiry and the saturation concept: a research note” (2008) 8 Qualitative Research 137.

Virginia Braun and Victoria Clarke “Using thematic analysis in psychology” (2006) 3(2) *Qualitative Research in Psychology* 77.

John W Budd and Alexander JS Colvin “Improved metrics for workplace dispute resolution procedures: efficiency, equity, and voice” (2007) 47 *Industrial Relations* 460.

Suzette Chapple “Income Tax Dispute Resolution: Can we Learn from Other Jurisdictions?” (1999) 2 *Journal of Australian Taxation* 312.

Jeremiah Coder “Overcoming Appeals’ Bad Rap” (2011) 132 *Tax Notes* 1196.

Yochi Cohen-Charash and Paul Spector “The Role of Justice in Organizations: A Meta-Analysis” (2001) 86 *Organizational Behavior and Human Decision Processes* 278.

Jason Collins and Ian Hyde “Tax Disputes: HMRC’s code of governance” (2012) 14 *PM-Tax* 12.

Jason A Colquitt, Donald E Conlon, Michael J Wesson, Christopher OLH Porter and K Yee Ng “Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research” (2001) 86 *Journal of Applied Psychology* 425.

John P Conbere “Theory Building for Conflict Management System Design” (2001) 19 *Conflict Resolution Quarterly* 215.

Cathy A Costantino “Second Generational Organizational Conflict Management Systems Design: A Practitioner’s Perspective on Emerging Issues” (2009) 14 *Harvard Negotiation Law Review* 81.

Michael D’Ascenzo “It is the Community’s Tax System” (2006) 2(1) *Journal of the Australasian Tax Teachers Association* 9.

Joanne Dunne “Re-solving Tax Disputes” (2008) 101 *NZLawyer* 18.

Martina Y Feilzer “Doing Mixed Methods Research Pragmatically: Implications for the Rediscovery of Pragmatism as a Research Paradigm” (2010) 4 *Journal of Mixed Methods Research* 6.

Peter Feuille “Why Does Grievance Mediation Resolve Grievances?” (1992) 8 *Negotiation Journal* 131.

Peter Feuille and Deborah M Kolb “Waiting in the Wings: Mediation’s Role in Grievance Resolution” (1994) 10 *Negotiation Journal* 249.

Robert Fisher “When should mediators bite their tongue?” (2010) 150 *NZLawyer* 18.

Stephen Folan “Even ADR Must Pay Its Dues: An Analysis of the Internal Revenue Service’s ADR Programs and Where They Still Need to Grow” (2013) 13 *Pepperdine Dispute Resolution Law Journal* 281.

Susan D Franck “Integrating Investment Treaty Conflict and Dispute Systems Design” (2007) 92 *Minnesota Law Review* 161.

Stephen B Goldberg “The Mediation of Grievances under a Collective Bargaining Contract: An Alternative to Arbitration” (1982) 77 Northwestern University Law Review 270.

Stephen B Goldberg and Jeanne M Brett “An experiment in the mediation of grievances” (1983) 106(3) Monthly Labor Review 23.

Shelley Griffiths “No discretion should be unconstrained: Considering the ‘care and management’ of taxes and the settlement of tax disputes in New Zealand and the UK” (2012) British Tax Review 167.

Greg Guest, Arwen Bunce and Laura Johnson “How Many Interviews Are Enough?: An Experiment with Data Saturation and Variability” 18 Field Methods (2006) 59.

Martina Hartner, Silvia Rechberger, Erich Kirchler, and Alfred Schabmann “Procedural Fairness and Tax Compliance” (2008) 38 Economic Analysis & Policy 137.

Betty R Jackson and Valerie C Milliron “Tax Compliance Research: Findings, Problems, and Prospects” (1986) 5 Journal of Accounting Literature 125.

Melinda Jone “Evaluating Australia’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (2015) 13 eJournal of Tax Research 552.

Melinda Jone “Evaluating New Zealand’s Tax Dispute Resolution System: A Dispute Systems Design Perspective” (2016) 22 New Zealand Journal of Taxation Law and Policy 228.

Melinda Jone “What can the United Kingdom’s Tax Dispute Resolution System Learn from Australia? – An Evaluation and Recommendations from a Dispute Systems Design Perspective” (2017) 32(1) Australian Tax Forum 59.

Melinda Jone and Andrew J Maples “Mediation as an alternative option in Australia's tax disputes resolution process” (2012) 27(3) Australian Tax Forum 527.

Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand's Tax Dispute Resolution Procedures” (2012) 18 New Zealand Journal of Taxation Law and Policy 412.

Melinda Jone and Andrew J Maples “Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures: Refining a Proposed Regime” (2013) 19 New Zealand Journal of Taxation Law and Policy 301.

Ken Jones “Appeals Arbitration: Not a Compelling Litigation Alternative” (2014) 143 Tax Notes 1059.

Gerald A Kafka, Rita A Cavanagh and Sean M Akins “Do IRS Appeals’ Office Ex Parte Prohibitions Need Strengthening?” (2009) 122 Tax Notes 1591.

Mark Keating “Comment: New Zealand’s tax dispute procedure: Time for a change” (2008) 14 New Zealand Journal of Taxation Law and Policy 425.

Erich Kirchler, Erik Hoelzl and Ingrid Wahl “Enforced versus voluntary tax compliance: The ‘slippery slope’ framework” (2008) 29 Journal of Economic Psychology 210.

John Lande “Principles for Policymaking About Collaborative Law and Other ADR Processes” (2007) 22 Ohio State Journal on Dispute Resolution 619.

Margaret D LeCompte and Judith P Goetz “Problems of Reliability and Validity in Ethnographic Research” (1982) 52 Review of Educational Research 31.

Michael Lennard “Peace in Our Time: Part 1” (2008) 4 Taxation Today 29.

Michael Lennard “Peace in Our Time: Part 2” (2008) 5 Taxation Today 16.

Struan Little, Geof D Nightingale and Ainslie Fenwick “Development of Tax Policy in New Zealand: The Generic Tax Policy Process” (2013) 61 Canadian Tax Journal 1043.

Jennifer F Lynch “Beyond ADR: A Systems Approach to Conflict Management” (2001) 17 Negotiation Journal 207.

Philip Lignier “Measuring the managerial benefits of tax compliance: A fresh approach” (2009) 24(2) Australian Tax Forum 117.

Jennifer F Lynch “Integrated Conflict Management Programs Emerge as an Organization Development Strategy” (2003) 21 Alternatives to the High Cost of Litigation 99.

Bryan Marshall, Peter Cardon, Amit Poddar and Renee Fontenot “Does Sample Size Matter in Qualitative Research?: A Review of Qualitative Interviews in IS Research” (2013) 54 Journal of Computer Information Systems 11.

Denham Martin “Honest Taxpayers Need Advocates and Real Rights” (2013) 212 NZLawyer 22.

Gregory P Mathews “Using Negotiation, Mediation and Arbitration to Resolve IRS-Taxpayer Disputes” (2004) 19 Ohio State Journal on Dispute Resolution 709.

Kirsten J McDonough “Resolving Federal Tax Disputes Through ADR” (1993) 48(2) Arbitration Journal 38.

Margaret McKerchar “The impact of income tax complexity on practitioners in Australia” (2005) 20(4) Australian Tax Forum 529.

Margaret McKerchar “Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation” (2008) 6 eJournal of Tax Research 5.

Leonora Meyercord “Avoiding state bankruptcy: Mediation as an alternative to resolving state tax disputes” (2010) 29 The Review of Litigation 925.

Sarah Miles “The Price we Pay for a Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation?” (2015) 46 Victoria University of Wellington Law Review 361.

Sheena Mookhey “Tax disputes system design” (2013) 11 eJournal of Tax Research 79.

Janice M Morse “The Significance of Saturation” (1995) 5 Qualitative Health Research 147.

Kristina Murphy “The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders” (2004) 28 *Law and Human Behaviour* 187.

Kristina Murphy “Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance” (2005) 32 *Journal of Law and Society* 562.

Tina Nabatchi and Lisa B Bingham “From Postal to Peaceful: Dispute Systems Design in the USPS REDRESS Program” (2010) 30 *Review of Public Personnel Administration* 211.

Lindsey Ng and Chris Cunniff “Inland Revenue service – are you satisfied?” (2013) 92(1) *Chartered Accountants Journal* 78.

Peter Nias “Mediating tax disputes: All in a day’s work?” (2014) 1241 *The Tax Journal* 17.

Anthony J Onwuegbuzie and Nancy L Leech “On Becoming a Pragmatic Researcher: The Importance of Combining Quantitative and Qualitative Research Methodologies” (2005) 8 *International Journal of Social Research Methodology* 375.

David Parsly “The Internal Revenue Service and Alternative Dispute Resolution: Moving from Infancy to Legitimacy” (2007) 8 *Cardozo Journal of Conflict Resolution* 677.

Alison Pavlovich “The Tax Disputes Process and Taxpayer Rights: Are the Inconsistencies Proportional?” (2016) 22 *NZJTL* 70.

James Peck and Andrew J Maples “Comment: The Tax Disputes Resolution Process in New Zealand: What about the Little Fellas?” (2010) 16 *New Zealand Journal of Taxation Law and Policy* 348.

Maryann Richardson and Adrian J Sawyer “A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects” (2001) 16(2) *Australian Tax Forum* 137.

Peter Robinson, Arthur Pearlstein and Bernard Mayer “DyADS: Encouraging ‘Dynamic Adaptive Dispute Systems’ in the Organized Workplace” (2005) 10 *Harvard Negotiation Law Review* 339.

William Roche and Paul Teague “Do Conflict Management Systems Matter?” (2012) 51 *Human Resource Management* 231.

Mary P Rowe “The Ombudsman's Role in a Dispute Resolution System” (1991) 7 *Negotiation Journal* 353.

Neil Russ and Sam Davies “A better way of resolving tax disputes?” (2013) 92(7) *Chartered Accountants Journal* 71.

Adrian J Sawyer “Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation: Some Recent Developments” (1996) 2 *New Zealand Journal of Taxation Law and Policy* 17.

Adrian J Sawyer “Reviewing tax policy development in New Zealand: Lessons from a delicate balancing of ‘law and politics’” (2013) 28(2) *Australian Tax Forum* 401.

Stephanie Smith and Janet Martinez “An Analytic Framework for Dispute Systems Design” (2009) 14 Harvard Negotiation Law Review 123.

Tania Sourdin “Five Reasons Why Judges Should Conduct Settlement Conferences” (2011) 37 Monash University Law Review 145.

Symposium “Conflict Resolution in the Field: Assessing the Past, Charting the Future” (2004) 22 Conflict Resolution Quarterly 1.

Binh Tran-Nam and Michael Walpole “Independent Tax Dispute Resolution and Social Justice in Australia” (2012) 35 University of New South Wales Law Journal 470.

Tom R Tyler “The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities” (1997) 1 Personality and Social Psychology Review 323.

Karen Whitiskie “Five years on for facilitated conferences” (2015) 873 LawTalk 19.

Bobette Wolski “The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective” (1998) 10(1) Bond Law Review 1.

William Young “Tax disputes in New Zealand” (2009) 4(1) Journal of the Australasian Tax Teachers Association 1.

5. Reports and Submissions

American Bar Association Section of Taxation *Survey Report on the Independence of IRS Appeals* (11 August 2007).

Australian Taxation Office *GST Administration Annual Performance Report 2012-13* (Canberra, November 2013).

Australian Taxation Office “Submission on the Productivity Commission Inquiry: Access to Justice Arrangements” (12 February 2014).

Australian Taxation Office *Commissioner of Taxation Annual Report 2014-15* (Canberra, October 2015).

Australian Taxation Office *Commissioner of Taxation Annual Report 2015-16* (Canberra, October 2016).

Colmar Brunton *Satisfaction with Inland Revenue: November 2015* (4 November 2015).

Committee of Tax Experts *A Report to the Treasurer and Minister of Revenue – By a Committee of Experts on Tax Compliance* (Wellington, 1998).

EY *Tax Dispute Resolution: A New Chapter Emerges – Tax Administration Without Borders* (2010).

Family Court of Australia *Response of the Family Court of Australia to the Attorney-General's Department Paper on Primary Dispute Resolution Services in Family Law* (Sydney, 1997).

HM Revenue and Customs *Alternative Dispute Resolution for SMEs and Individuals: Project Evaluation Summary* (April 2013).

HM Revenue and Customs *How we Resolve Tax Disputes: The Tax Assurance Commissioner's Annual Report 2012-13* (July 2013).

HM Revenue and Customs *Alternative Dispute Resolution in Large or Complex Cases: Pilot Evaluation Summary* (September 2013).

HM Revenue and Customs *Research Report: Statutory Review Process* (August 2014).

HM Revenue and Customs *How we Resolve Tax Disputes: The Tax Assurance Commissioner's Annual Report 2015-16* (July 2016).

HM Revenue and Customs *Your Charter Annual Report: April 2015-March 2016* (July 2016).

House of Commons Committee of Public Accounts *HM Revenue & Customs 2010-11 Accounts: Tax Disputes: Sixty-First Report of Session 2010-12* (The Stationery Office, 20 December 2011) HC 1531.

House of Commons Committee of Public Accounts *Corporate Tax Settlements: Twenty-Fifth Report of Session 2015-16* (The Stationery Office, 23 February 2016) HC 788.

House of Representatives Standing Committee on Tax and Revenue *Tax Disputes* (Canberra, March 2015).

IFF Research *Large Business Panel Survey 2014* (HM Revenue and Customs Research Report 354, July 2015).

Inland Revenue *Taxation (Tax Administration and Remedial Matters) Bill – Officials Report to the Finance and Expenditure Select Committee on Submissions on the Bill* (April 2011).

Inland Revenue *Making Tax Simpler – Towards a New Tax Administration Act: A Government Discussion Document* (November 2015).

Inspector-General of Taxation *Review into the Underlying Causes and the Management of Objections to Tax Office Decisions* (Sydney, April 2009).

Inspector-General of Taxation *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution: A Report to the Assistant Treasurer* (Sydney, May 2012).

Inspector-General of Taxation *The Management of Tax Disputes: A Report to the Assistant Treasurer* (Sydney, January 2015).

Jennifer F Lynch *CCRA: Contemporary Conflict Resolution Approaches* (Canada Customs and Revenue Agency, Ottawa, 1998).

National Audit Office *Report by the Comptroller and Auditor General on HM Revenue and Customs 2010-2011 Accounts* (The Stationery Office, 7 July 2011) HC 981.

National Audit Office *HM Revenue and Customs: Settling Large Tax Disputes: Report by the Comptroller and Auditor General* (The Stationery Office, 12 June 2012) HC 188.

National Audit Office *Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* (The Stationery Office, 6 February 2015) HC 1029-1.

Nina E Olson *National Taxpayer Advocate 2007 Annual Report to Congress* (Internal Revenue Service, December 2007).

Nina E Olson *National Taxpayer Advocate 2011 Annual Report to Congress* (Internal Revenue Service, December 2011).

Nina E Olson *National Taxpayer Advocate 2013 Annual Report to Congress* (Internal Revenue Service, December 2013).

Nina E Olson *National Taxpayer Advocate 2015 Annual Report to Congress* (Internal Revenue Service, December 2015).

Nina E Olson *National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress – Volume 2* (Internal Revenue Service, August 2016).

Organisational Review Committee *Organisational Review of the Inland Revenue Department: Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* (Wellington, 1994).

PricewaterhouseCoopers “Submission on the Taxation (Tax Administration and Remedial Matters) Bill” (18 February 2011).

Society of Professionals in Dispute Resolution *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations* (Washington DC, 2001).

Tania Sourdin and Alan Shanks *Evaluating Alternative Dispute Resolution in Taxation Disputes: Final Report* (Australian Centre for Justice Innovation, Monash University, 23 February 2015).

Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, August 2008).

Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *Disputes: A Review, July 2010* (Wellington, September 2010).

Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants “Submission to the Finance and Expenditure Committee on the Taxation (Tax Administration and Remedial Matters) Bill” (21 February 2011).

Treasury Inspector General for Tax Administration *The Overall Independence of the Office of Appeals Appears to Be Sufficient* (September 2005).

United States General Accounting Office *IRS Initiatives to Resolve Disputes Over Tax Liabilities* (Washington DC, May 1997).

6. Dissertations

Karen Stilwell “Mediation of Canadian Tax Disputes” (Master of Laws Thesis, University of Toronto, 2014).

Sue Yong “Tax Compliance and Small and Medium Enterprise Operators: An Intra-Cultural Study in New Zealand” (PhD Dissertation, Auckland University of Technology, 2011).

7. Seminars, Conference Papers, Presentations and Speeches

Damien Browne and Ashley King “The latest on the ATO’s Management of Tax Audits and Disputes” (paper presented to the Tax Institute’s 30th National Convention, Gold Coast, 18-20 March 2015).

Niels Campbell and Michael Hendriksen “The conference phase of the tax disputes process – what you need to know” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Wellington, 26-27 October 2012).

Geoff Clews and Ele Duncan “Audits and Disputes: The Myths, The Realities and The Lessons to be Learnt” (paper presented to the New Zealand Law Society Tax Conference, Auckland, 13 October 2016) 85.

John Faire, Tom Ingram and Helen Rice “Judicial Settlement Conferences: A 360° Perspective” (New Zealand Law Society Seminar, Wellington, 10 November 2008).

Susan Glazebrook “Taxation Disputes in New Zealand” (paper presented to the Australasian Tax Teachers Association Conference, Auckland, 20-22 January 2013).

Shelley Griffiths “Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process” (paper presented to Australasian Tax Teachers Association Conference, Sydney, 16-18 January 2012).

Debbie Hastings “Reinventing the way we manage tax disputes” (speech to the Tax Institute of Australia Financial Services Conference 2015, Surfers Paradise, 20 February 2015).

Chris Jordan “Reinventing the ATO” (speech to the Tax Institute’s 30th National Convention, Gold Coast, 18-20 March 2015).

Mark Keating and Michael Lennard “Developments in tax disputes – Another step backwards?” (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Auckland, 11-12 November 2011).

Deen C Olsen “Alternative Dispute Resolution” (paper presented to the Forty-Ninth Canadian Tax Foundation Tax Conference, 1997) *Report of the Proceedings of the Forty-Ninth Tax Conference* (Canadian Tax Foundation, Toronto, 1998).

Binh Tran-Nam and Stewart Karlinsky “Small Business Law Complexity in Australia” (paper presented to the ATAX International Tax Administration Conference, Sydney, 27-28 March 2008).

Graham Tubb “Tax Disputes Procedures: A Current Snapshot” (paper presented to the New Zealand Law Society Tax Conference, Auckland, 5 September 2013) 149.

Fred Ward “Changes to the Disputes Resolution Process – A Practitioner’s Perspective” (paper presented to the New Zealand Law Society Tax Conference, Auckland, 5 September 2013) 165.

Kirsten Wielobob “IRS Appeals and Litigation Strategies and Process Updates” (paper presented to the Tax Executives Institute 64th Midyear Conference, Washington DC, 23-26 March 2014).

Kirsten Wielobob “Resolving Cases in Today’s Appeals” (paper presented to the Federal Bar Association Tax Law Conference 2015, Washington DC, 6 March 2015).

Kirsten Wielobob “What’s New in IRS Exam and Appeals” (panelist in the ABA Section of Taxation 2015 May Meeting, Washington DC, 7-9 May 2015).

Kirsten Wielobob “Recent Developments at Appeals” (paper presented to the Federal Bar Association Tax Law Conference 2016, Washington DC, 4 March 2016).

Sue Yong “Cultural diversity and tax compliance of SME entrepreneurs” (paper presented to the Australasian Tax Teachers Association Conference, Sydney, 16-18 January 2012).

8. Internet Materials

8.1 New Zealand

Inland Revenue “Annual report” (5 October 2004) <<http://www.ird.govt.nz/aboutir/reports/annual-report/>> (last accessed 7 November 2016).

Inland Revenue “Legal decisions – case notes” (17 July 2006) <<http://www.ird.govt.nz/technical-tax/case-notes/>> (last accessed 7 November 2016).

Inland Revenue “Changes to the disputes resolution process” (12 July 2010) <<http://www.ird.govt.nz/technical-tax/general-articles/changes-to-disputes-res-proc.html>> (last accessed 7 November 2016).

Inland Revenue “Taxation (Tax Administration and Remedial Matters) Act 2011: Disputes Process” (5 December 2011) <<http://www.ird.govt.nz/technical-tax/legislation/2011/2011-63/2011-63-disputes-process/>> (last accessed 7 November 2016).

Inland Revenue “Legal and Technical Services: Our services and contact details” (31 October 2013) <<http://www.ird.govt.nz/aboutir/who-we-are/structure/tlsg/>> (last accessed 7 November 2016).

Inland Revenue “Contact us” (31 March 2014) <<http://www.ird.govt.nz/contact-us/>> (last accessed 7 November 2016).

Inland Revenue “Disputing an assessment: The disputes resolution process” (3 April 2014) <<http://www.ird.govt.nz/how-to/disputes/changes-disputes.html>> (last accessed 7 November 2016).

Inland Revenue “Our compliance focus” (26 November 2014) <<http://www.ird.govt.nz/taxagents/compliance/>> (last accessed 7 November 2016).

Inland Revenue “The Disputes Review Unit - its role in the dispute resolution process” (14 July 2015) <<http://www.ird.govt.nz/technical-tax/general-articles/ga-adjudication-unit.html>> (last accessed 7 November 2016).

Inland Revenue “Tax data – audits and legal issues” (3 December 2015) <<http://www.ird.govt.nz/aboutir/audit-and-legal-issues/>> (last accessed 7 November 2016).

Inland Revenue “Business transformation: About Business transformation” (6 September 2016) <<http://www.ird.govt.nz/transformation/about-business-transformation/about-business-transformation-index.html>> (last accessed 7 November 2016).

Inland Revenue “Business transformation: Inland Revenue is changing” (6 September 2016) <<http://www.ird.govt.nz/transformation/how-changing/>> (last accessed 7 November 2016).

Inland Revenue “Forms and guides” <<http://www.ird.govt.nz/forms-guides/keyword/>> (last accessed 7 November 2016).

Inland Revenue “Get it done online: Comments and feedback” <<https://www.ird.govt.nz/online-services/service-name/services-c/online-provide-comment.html?id=righthtbs>> (last accessed 7 November 2016).

Inland Revenue “Recent media releases” <<http://www.ird.govt.nz/aboutir/media-centre/media-releases/>> (last accessed 7 November 2016).

Russell McVeagh “Latest Tax Bill proposes changes to the tax disputes procedure and repeal of gift duty” (8 December 2010) <http://www.russellmcveagh.com/Portals/1/Documents/Tax%20Update%20archive/TaxDecember2010_358.html> (last accessed 7 November 2016).

Statistics New Zealand “Business demography tables” (27 October 2016) <http://www.stats.govt.nz/tools_and_services/nzdotstat/tables-by-subject/business-demography-tables.aspx> (last accessed 7 November 2016).

8.2 Australia

Australian Taxation Office “Practice Statement Law Administration 2009/9: Conduct of ATO litigation and engagement of ATO Dispute Resolution” (2009) <<http://law.ato.gov.au/atolaw/view.htm?DocID=PSR/PS20099/NAT/ATO/00001>> (last accessed 7 November 2016).

Australian Taxation Office “Practice Statement Law Administration 2013/3: Alternative Dispute Resolution (ADR) in ATO Disputes” (2013) <<http://law.ato.gov.au/atolaw/view.htm?locid=PSR/PS20133/NAT/ATO>> (last accessed 7 November 2016).

Australian Taxation Office “Compliance activity and objections” (19 May 2014) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Compliance-activity-and-objections/>> (last accessed 7 November 2016).

Australian Taxation Office “Early assessment and resolution” (26 May 2014)
<<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Litigation/Early-assessment-and-resolution/>> (last accessed 7 November 2016).

Australian Taxation Office “Litigation statistics” (27 May 2014)
<<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Litigation-statistics/>> (last accessed 7 November 2016).

Australian Taxation Office “Vision, mission and values statement” (4 September 2014)
<<https://www.ato.gov.au/About-ATO/About-us/In-detail/Strategic-direction/ATO-vision,-mission-and-values-statement/>> (last accessed 7 November 2016).

Australian Taxation Office “Review into the ATO’s use of ADR: Recommendation 3.7” (13 November 2014)
<<https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Inspector-General-of-Taxation/Review-into-the-ATO-s-use-of-ADR/?anchor=Recommendation37#Recommendation37>> (last accessed 7 November 2016).

Australian Taxation Office “ATO plain English guide to alternative dispute resolution” (1 June 2015)
<<http://www.ato.gov.au/About-ATO/About-us/In-detail/Key-documents/ATO-plain-English-guide-to-alternative-dispute-resolution/>> (last accessed 7 November 2016).

Australian Taxation Office “Code of settlement” (18 August 2015)
<<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Settlement/Code-of-settlement/>> (last accessed 7 November 2016).

Australian Taxation Office “Practical guide to the ATO Code of settlement” (21 August 2015)
<<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Settlement/A-practical-guide-to-the-ATO-code-of-settlement/>> (last accessed 7 November 2016).

Australian Taxation Office “Resolving disputes” (31 August 2015)
<<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Statistics/Resolving-disputes/>> (last accessed 7 November 2016).

Australian Taxation Office “Disputes policy” (7 September 2015)
<<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Resolving-disputes/Disputes-policy/>> (last accessed 7 November 2016).

Australian Taxation Office “Building confidence” (29 October 2015)
<<https://www.ato.gov.au/General/Building-confidence/>> (last accessed 7 November 2016).

Australian Taxation Office “In-House facilitation” (19 November 2015)
<<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/In-house-Facilitation/>> (last accessed 7 November 2016).

Australian Taxation Office “Practice Statement Law Administration 2015/1: Code of settlement” (2015)
<<http://law.ato.gov.au/atolaw/view.htm?docid=%22PSR%2FPS20151%2FNAT%2FATO%2F00001%22>> (last accessed 7 November 2016).

Australian Taxation Office “Dispute or object to an ATO decision” (27 January 2016) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/>> (last accessed 7 November 2016).

Australian Taxation Office “Independent review of the Statement of Audit Position for groups with a turnover greater than \$250m” (7 June 2016) <[https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Independent-review/Independent-review-of-the-Statement-of-Audit-Position-for-groups-with-a-turnover-greater-than-\\$250m/](https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Independent-review/Independent-review-of-the-Statement-of-Audit-Position-for-groups-with-a-turnover-greater-than-$250m/)> (last accessed 7 November 2016).

Australian Taxation Office “Other languages” (3 August 2016) <<https://www.ato.gov.au/General/Other-languages/>> (last accessed 7 November 2016).

Australian Taxation Office “Reinventing the ATO” (16 September 2016) <<https://www.ato.gov.au/About-ATO/About-us/Reinventing-the-ATO/>> (last accessed 7 November 2016).

Australian Taxation Office “Taxpayer perceptions of fairness research” (30 September 2016) <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Annual-research/Perceptions-of-Fairness-in-Disputes-survey/>> (last accessed 7 November 2016).

Australian Taxation Office “Early engagement – what to expect” (5 October 2016). <<https://www.ato.gov.au/Business/Large-business/Objections-and-amendments/Early-engagement---what-to-expect/>> (last accessed 7 November 2016).

Australian Taxation Office “How we deal with your objection” (1 November 2016) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Object-to-an-ATO-decision/How-we-deal-with-your-objection/>> (last accessed 7 November 2016).

Australian Taxation Office “Phone us” (1 November 2016) <<https://www.ato.gov.au/about-ato/about-us/contact-us/phone-us/>> (last accessed 7 November 2016).

Australian Taxation Office “Legal database” <<https://www.ato.gov.au/law/#Law>> (last accessed 7 November 2016).

Australian Taxation Office “Media centre” <<https://www.ato.gov.au/Media-centre/?sorttype=SortByType>> (last accessed 7 November 2016).

National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016).

National Alternative Dispute Resolution Advisory Council *Alternative Dispute Resolution in the Civil Justice System: Issues Paper* (Barton, 2009) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016).

National Alternative Dispute Resolution Advisory Council *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Barton, 2009) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016).

National Alternative Dispute Resolution Advisory Council *Your Guide to Dispute Resolution* (Barton, 2012) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016).

8.3 Canada

Canada Revenue Agency “Make a service complaint?” (12 April 2016) <<http://www.cra-arc.gc.ca/gncy/cmpltntsdspts/srvccmpltnts/menu-eng.html>> (last accessed 7 November 2016).

8.4 United Kingdom

Centre for Effective Dispute Resolution “About us” <http://www.cedr.com/about_us/> (last accessed 7 November 2016).

Centre for Effective Dispute Resolution “Glossary of terms” <http://www.cedr.com/about_us/library/glossary.php> (last accessed 7 November 2016).

HM Revenue and Customs “Appeals and tribunals: an overview for agents and advisers (1 January 2014) <<https://www.gov.uk/appeals-and-tribunals-an-overview-for-agents-and-advisers>> (last accessed 7 November 2016).

HM Revenue and Customs “HM Revenue and Customs: leaflets, factsheets and booklets” (20 October 2014) <<https://www.gov.uk/government/collections/hm-revenue-and-customs-leaflets-factsheets-and-booklets>> (last accessed 7 November 2016).

HM Revenue and Customs “Tax disputes: Alternative Dispute Resolution (ADR)” (8 December 2014) <<https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr>> (last accessed 7 November 2016).

HM Revenue and Customs “Webinars, e-learning and videos if you’re a tax agent or adviser” (16 December 2014) <<https://www.gov.uk/government/news/webinars-e-learning-and-videos-if-youre-a-tax-agent-or-adviser>> (last accessed 7 November 2016).

HM Revenue and Customs “HMRC announces next step in its ten-year modernisation programme” (23 November 2015) <<https://www.gov.uk/government/publications/issue-briefing-hmrc-announces-next-step-in-its-ten-year-modernisation-programme/hmrc-announces-next-step-in-its-ten-year-modernisation-programme-to-become-a-tax-authority-for-the-future>> (last accessed 7 November 2016).

HM Revenue and Customs “Your Charter” (12 January 2016) <<https://www.gov.uk/government/publications/your-charter/your-charter#A2>> (last accessed 7 November 2016).

HM Revenue and Customs “Single departmental plan 2015 to 2020” (24 May 2016) <<https://www.gov.uk/government/publications/hmrc-single-departmental-plan-2015-to-2020/single-departmental-plan-2015-to-2020>> (last accessed 7 November 2016).

HM Revenue and Customs “Dealing with HMRC if you have additional needs” (1 July 2016) <<https://www.gov.uk/dealing-hmrc-additional-needs>> (last accessed 7 November 2016).

HM Revenue and Customs “Appeal to the tax tribunal” (25 October 2016) <<https://www.gov.uk/tax-tribunal>> (last accessed 7 November 2016).

HM Revenue and Customs “Disagree with a tax decision” (25 October 2016) <<https://www.gov.uk/tax-appeals/overview>> (last accessed 7 November 2016).

HM Revenue and Customs “Self Assessment tax returns” (25 October 2016) <<https://www.gov.uk/self-assessment-tax-returns/overview>> (last accessed 7 November 2016).

HM Revenue and Customs “About us” <<https://www.gov.uk/government/organisations/hm-revenue-customs/about>> (last accessed 7 November 2016).

HM Revenue and Customs “Announcements” <<https://www.gov.uk/government/announcements?departments%5B%5D=hm-revenue-customs>> (last accessed 7 November 2016).

HM Revenue and Customs “Credit Card Sales Campaign” <<https://www.gov.uk/creditcardsales>> (last accessed 7 November 2016).

HM Revenue and Customs “HMRC internal manual – Appeals reviews and tribunals guidance” <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance>> (last accessed 7 November 2016).

HM Revenue and Customs “HMRC internal manual – Self Assessment Manual: Manage work: customer service: welsh language service” <<https://www.gov.uk/hmrc-internal-manuals/self-assessment-manual/sam70160>> (last accessed 7 November 2016).

HM Revenue and Customs “How we resolve tax disputes” <<https://www.gov.uk/government/collections/how-we-resolve-tax-disputes>> (last accessed 7 November 2016).

HM Revenue and Customs “Let Property Campaign” <<https://www.gov.uk/let-property-campaign>> (last accessed 7 November 2016).

HM Revenue and Customs “Revenue and Customs Briefs” <<https://www.gov.uk/government/collections/revenue-and-customs-briefs>> (last accessed 7 November 2016).

HM Revenue and Customs “Second Incomes Campaign” <<https://www.gov.uk/secondincomes>> (last accessed 7 November 2016).

Rachael Power “ADR proving more relevant for smaller cases” (13 February 2014) AccountingWEB.co.uk <<http://www.accountingweb.co.uk/blog-post/adr-more-successful-small-medium-size-cases>> (last accessed 7 November 2016).

Rachael Power “ADR: Handling SME v corporate cases” (26 February 2014) AccountingWEB.co.uk <<http://www.accountingweb.co.uk/blog-post/adr-handling-sme-vs-corporate-cases>> (last accessed 7 November 2016).

Sara White “Ministry of Justice trails online alternative to tax tribunal applications” (7 November 2016) CCH Daily <<https://www.cchdaily.co.uk/ministry-justice-trials-online-alternative-tax-tribunal-applications>> (last accessed 20 November 2016).

8.5 United States

Internal Revenue Service “Post-Appeals Mediation” (25 January 2016) <<http://www.irs.gov/Individuals/Post-Appeals-Mediation>> (last accessed 7 November 2016).

Internal Revenue Service “IRS Future State” (4 March 2016) <<https://www.irs.gov/uac/newsroom/irs-future-state>> (last accessed 7 November 2016).

Internal Revenue Service “Taxpayer Advocacy Panel (TAP)” (13 April 2016) <<https://www.irs.gov/Advocate/Taxpayer-Advocacy-Panel>> (last accessed 7 November 2016).

Internal Revenue Service “Appeals Mediation Programs: Alternative Dispute Resolution (ADR)” (19 April 2016) <<http://www.irs.gov/Individuals/Appeals-Mediation-Programs>> (last accessed 7 November 2016).

Internal Revenue Service “Low Income Taxpayer Clinics” (4 May 2016) <<http://www.irs.gov/Advocate/Low-Income-Taxpayer-Clinics>> (last accessed 7 November 2016).

Internal Revenue Service “Is Appeals the Place for You?” (11 May 2016) <<https://www.irs.gov/individuals/is-appeals-the-place-for-you-1>> (last accessed 7 November 2016).

Internal Revenue Service “Appeals Online Self-Help Tools” (23 May 2016) <<http://www.irs.gov/Individuals/Appeals-Online-Self-Help-Tools>> (last accessed 7 November 2016).

Internal Revenue Service “Forms and Publications about your Appeal Rights” (7 June 2016) <<http://www.irs.gov/Individuals/Forms-and-Publications-About-Your-Appeal-Rights>> (last accessed 7 November 2016).

Internal Revenue Service “Understanding IRS Guidance - A Brief Primer” (6 July 2016) <<http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer>> (last accessed 7 November 2016).

Internal Revenue Service “Tax Statistics” (19 July 2016) <<https://www.irs.gov/uac/tax-stats>> (last accessed 7 November 2016).

Internal Revenue Service “Topic 102 - Tax Assistance for Individuals with Disabilities” (10 August 2016) <<https://www.irs.gov/taxtopics/tc102.html>> (last accessed 7 November 2016).

Internal Revenue Service “Compliance Assurance Process” (26 August 2016) <<http://www.irs.gov/Businesses/Corporations/Compliance-Assurance-Process>> (last accessed 7 November 2016).

Internal Revenue Service “Appeals ... Resolving Tax Disputes” (6 October 2016) <<https://www.irs.gov/Individuals/Appeals-Resolving-Tax-Disputes>> (last accessed 7 November 2016).

Internal Revenue Service “Accessible Forms & Publications” (1 November 2016) <<https://www.irs.gov/forms-pubs/accessible-products>> (last accessed 7 November 2016).

Internal Revenue Service “Actions on Decisions (AOD)”
<<http://apps.irs.gov/app/picklist/list/actionsOnDecisions.html>> (last accessed 7 November 2016).

Internal Revenue Service “Commissioner’s Comments, Statements and Remarks”
<<http://www.irs.gov/uac/Commissioner's-Comments,-Statements-and-Remarks>> (last accessed 7 November 2016).

Internal Revenue Service “Compliance & Enforcement News”
<<http://www.irs.gov/uac/Compliance-&-Enforcement-News>> (last accessed 7 November 2016).

Internal Revenue Service “IRS Nationwide Tax Forums Online”
<<http://www.irstaxforumsonline.com/>> (last accessed 7 November 2016).

Internal Revenue Service “IRS Video Portal” <<http://www.irsvideos.gov/>> (last accessed 7 November 2016).

Internal Revenue Service “National Taxpayer Advocate Reports to Congress and Research”
<<https://www.irs.gov/Advocate/Reports-to-Congress>> (last accessed 7 November 2016).

IRS Oversight Board “Home – IRS Oversight Board”
<<https://www.treasury.gov/irsob/Pages/default.aspx>> (last accessed 7 November 2016).

Taxpayer Advocate Service “National Taxpayer Advocate Public Forums” (22 June 2016)
<[https://taxpayeradvocate.irs.gov/news/national-taxpayer-advocate-public-forums?category=Tax News&taxissue=2556](https://taxpayeradvocate.irs.gov/news/national-taxpayer-advocate-public-forums?category=Tax%20News&taxissue=2556)> (last accessed 7 November 2016).

Taxpayer Advocate Service “Taxpayer Advocate Service”
<<http://www.taxpayeradvocate.irs.gov/>> (last accessed 7 November 2016).

8.6 General

Eric Brahm and Julian Ouellet “Designing New Dispute Resolution Systems” (September 2003) Beyond Intractability <<http://www.beyondintractability.org/essay/designing-dispute-systems>> (last accessed 7 November 2016).

Ministry of Business, Innovation and Employment “Glossary” (15 September 2015)
<<http://www.mbie.govt.nz/about/our-work/roles-and-responsibilities/government-centre-dispute-resolution/tools-and-resources/glossary>> (last accessed 7 November 2016).

Nicola White “Mediating Tax Disputes: Global Developments” (12 December 2013) CEDR
<<http://www.cedr.com/articles/?item=Mediating-Tax-Disputes-Global-Developments>> (last accessed 7 November 2016).

9. Newspaper Articles

Hamish Fletcher “Bankruptcy declared for \$500m IRD battler” *The New Zealand Herald* (online ed, Auckland, 19 November 2015).

Nassim Khadem “ATO ‘cowboys’ culture ruined lives, inquiry told” *Sydney Morning Herald* (online ed, Sydney, 29 November 2014).

Nassim Khadem “ATO seeks to make tax disputes resolution more cordial” *Sydney Morning Herald* (online ed, Sydney, 20 July 2015).

Adam Palin “Keeping disputes out of the courtroom” *Financial Times* (online ed, London, 24 April 2015).

Adam Palin “Taxman starts talking to resolve tax disputes” *Financial Times* (online ed, London, 11 December 2015).

Kevin Rawlinson “Google agrees to pay British authorities £130 in back taxes” *The Guardian* (online ed, London, 23 January 2016).

10. Other Materials

10.1 New Zealand

Courts of New Zealand *Judicial Settlement Conferences: High Court Guidelines* (April 2012).

Inland Revenue *Inland Revenue’s Charter* (IR 614, March 2009).

Inland Revenue *Notice of Proposed Adjustment* (IR 770, November 2009).

Inland Revenue “IS 10/07: Care and management of the taxes covered by the Inland Revenue Acts – section 6A(2) and (3) of the Tax Administration Act 1994” (2010) 22(10) Tax Information Bulletin 17.

Inland Revenue *If you disagree with an assessment* (IR 778, December 2011).

Inland Revenue *Disputing a notice of proposed adjustment: What to do if Inland Revenue disputes your assessment* (IR 777, January 2012).

Inland Revenue *Disputing an assessment: What to do if you dispute an assessment* (IR 776, April 2012).

Inland Revenue “SPS 15/01: Finalising agreements in tax investigations” (2015) 27(9) Tax Information Bulletin 24.

Inland Revenue *Statement of Intent 2016-20* (B-23 SOI, July 2016).

Inland Revenue *IR for the future – Te Pae Tawhiti* (August 2016).

Inland Revenue “SPS 16/05: Disputes resolution process commenced by the Commissioner of Inland Revenue” (2016) 28(11) Tax Information Bulletin 14.

Inland Revenue “SPS 16/06: Disputes resolution process commenced by a taxpayer” (2016) 28(11) Tax Information Bulletin 50.

10.2 Australia

Australian Taxation Office *Taxpayer's Charter – What you need to know* (Canberra, June 2010).

Australian Taxation Office *Dispute management plan 2012-13* (Canberra, October 2012).

Australian Taxation Office *Dispute management plan 2013-14* (Canberra, January 2014).

Australian Taxation Office *Corporate plan 2014-18* (Canberra, June 2014).

Australian Taxation Office *Reinventing the ATO – Program Blueprint* (Canberra, March 2015).

Australian Taxation Office *Corporate plan 2015-19* (Canberra, July 2015).

Australian Taxation Office *Corporate plan 2016-17* (Canberra, August 2016).

10.3 United Kingdom

HM Revenue and Customs *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in Large or Complex Cases* (April 2012).

HM Revenue and Customs *Our approach to tax compliance* (September 2012).

HM Revenue and Customs *Resolving tax disputes: Commentary on the litigation and settlement strategy* (November 2013).

HM Revenue and Customs *Code of governance for resolving tax disputes* (July 2014).

HM Revenue and Customs *Alternative Dispute Resolution* (CC/FS21, October 2015).

HM Revenue and Customs *General information about compliance checks* (CC/FS1a, November 2015).

HM Revenue and Customs *Making tax digital* (December 2015).

HM Revenue and Customs *HM Revenue and Customs (HMRC) decisions – what you can do if you disagree* (HMRC1, February 2016).

Ministry of Justice (UK) *The Dispute Resolution Commitment* (May 2011).

10.4 United States

Internal Revenue Manual.

Internal Revenue Service *Closing Agreement on Final Determination Covering Specific Matters* (Form 906, August 1994).

Internal Revenue Service *Your Appeal Rights and How To Prepare a Protest If You Don't Agree* (IRS Pub. No. 5, January 1999).

Internal Revenue Service *Income Tax Examination Changes* (Form 4549, May 2008).

Internal Revenue Service *Appeals: Introduction to Alternative Dispute Resolution* (IRS Pub. No. 4167, July 2012).

Internal Revenue Service *Examination of Returns, Appeal Rights and Claims for Refund* (IRS Pub. No. 556, September 2013).

Internal Revenue Service *Appeals* (IRS Pub. No. 4227, October 2013).

Internal Revenue Service *Collection Appeal Rights* (Pub. No. 1660, February 2014).

Internal Revenue Service *Strategic Plan FY 2014-2017* (IRS Pub. No. 3744, June 2014).

Internal Revenue Service Memorandum for Appeals Employees AP-08-0714-0004 (2 July 2014).

Internal Revenue Service *Your Rights as a Taxpayer* (IRS Pub. No. 1, December 2014).

Internal Revenue Service *The IRS Collection Process* (Pub. No. 594, January 2015).

Internal Revenue Service *Taxpayer Advocate Service: We are Here to Help You* (IRS Pub. No. 1546, June 2016).

Internal Revenue Service Rev. Proc. 94-67, 1994-2 C.B. 800.

Internal Revenue Service Rev. Proc. 99-28, 1999-29 I.R.B. 109.

Internal Revenue Service Rev. Proc. 2003-40, 2003-25 I.R.B. 1044.

Internal Revenue Service Rev. Proc. 2003-41, 2003-25 I.R.B. 1047.

Internal Revenue Service Rev. Proc. 2006-44, 2006-2 C.B. 800.

Internal Revenue Service Rev. Proc. 2012-18, 2012-10 I.R.B. 455.

Internal Revenue Service Rev. Proc. 2014-63, 2014-53 I.R.B. 1014.

Internal Revenue Service Rev. Proc. 2015-41, 2015-35 I.R.B. 263.

Internal Revenue Service Rev. Proc. 2015-44, 2015-38 I.R.B. 354.

Internal Revenue Service Rev. Proc. 2016-19, 2016-13 I.R.B. 497.

Internal Revenue Service Rev. Proc. 2016-30, 2016-21 I.R.B. 981.

Internal Revenue Service Rev. Proc. 2016-57, 2016-49 I.R.B. 786.

Internal Revenue Service Rev. Proc. 2017-1, 2017-1 I.R.B. 1.

10.5 General

Maurits Barendrecht “In Search of Microjustice: Five Basic Elements of a Dispute System” (Tilburg University Legal Studies Working Paper No. 002/2009, 29 January 2009).

Organisation for Economic Co-operation and Development Centre for Tax Policy and Administration *Principles of Good Tax Administration – Practice Note* (GAP001, 21 September 2001).

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Appendix 1: Additional Information on the Four Jurisdictions' Tax Dispute Resolution Procedures

This appendix provides supplementary information on the tax dispute resolution systems in place generally up until 30 November 2016, in the jurisdictions evaluated in chapter 4 (New Zealand (NZ) and Australia) and chapter 5 (the United Kingdom (UK) and the United States (US)). As stated in chapter 3, section 3.5.4 of this thesis, this appendix is supplementary in the respect that it provides, *inter alia*, a contextual background as well as evidentiary material for the DSD evaluations conducted. It also provides a source of references for readers to obtain further information on the selected jurisdictions' tax dispute resolution systems. The four abovementioned jurisdictions are contained in Appendices 1.1 – 1.4, respectively.

Appendix 1.1: The New Zealand Tax Dispute Resolution Procedures

1.1.1 The New Zealand tax dispute resolution procedures: Overview¹

The current New Zealand (NZ) tax system operates on a self-assessment basis whereby certain taxpayers are required to file tax returns and to take tax positions based on a self-assessment of their financial affairs. The Commissioner of Inland Revenue (the NZ Commissioner) monitors taxpayer compliance by conducting targeted (or to a lesser degree, random) audits and/or through conducting further investigation of a taxpayer's affairs. As a result of these audits and/or investigations, the NZ Commissioner may propose adjustments (that may affect the tax payable by the taxpayer) to which the taxpayer may agree or disagree with. A tax dispute can thus arise.²

Part IVA (disputes procedures) of the Tax Administration Act 1994 (TAA 1994) prescribes the dispute resolution procedures. Inland Revenue may not amend a taxpayer's assessment before the dispute resolution process is complete, except in limited circumstances.³ Hence, the dispute resolution process occurring prior to an assessment being issued by Inland Revenue is known as the pre-assessment phase of the dispute resolution process.

¹ The material in Appendix 1.1 was reviewed and subsequently discussed with the researcher by Alistair Hodson (Lecturer, Department of Accounting and Information Systems, College of Business and Law, University of Canterbury) on 24 April 2014 and 22 May 2014, respectively and also reviewed by and discussed with Dr Kerrie Sadiq (Professor of Taxation, School of Accountancy, Queensland University of Technology Business School) on 21 September 2015 and 5 October 2015, respectively. The researcher is grateful for their feedback.

² As a result of discussions and negotiations between the taxpayer and Inland Revenue after the investigation stage, an agreed adjustment may be entered into by the parties. Where an agreed adjustment is signed by a taxpayer prior to the formal dispute process commencing, the taxpayer may subsequently contest the issues that were subject to the final agreement by following the statutory dispute process. See Inland Revenue "SPS 15/01: Finalising agreements in tax investigations" (2015) 27(9) Tax Information Bulletin 24 ["SPS15/01"] at [9] and [44].

³ TAA 1994, s 89N.

The dispute resolution process is initiated by the issuing of a Notice of Proposed Adjustment (NOPA (NZ)) by one party (the initiating party) to another that states and explains the proposed adjustment as compared to the taxpayer's prior tax position. The NOPA (NZ) may be initiated either by the NZ Commissioner (for example, to advise a taxpayer of a proposed adjustment in relation to a tax position taken by a taxpayer), or the taxpayer (for example, to advise the NZ Commissioner of a proposed adjustment to an assessment issued by the NZ Commissioner, in response to some other disputable decision or where the taxpayer has filed conservatively and issues a NOPA (NZ) contending a different outcome).⁴ If the recipient (the responding party) disagrees with the NOPA (NZ), the responding party must reject the proposed adjustment by issuing a Notice of Response (NOR). Where the NZ Commissioner has issued a NOR in response to a taxpayer initiated NOPA (NZ), the taxpayer must reject the NZ Commissioner's NOR in writing to ensure the dispute process continues.⁵

Following the rejection of a NOR, a conference between the parties is usually scheduled (it is an administrative practice and not a legislative requirement) to discuss the issues in more depth and potentially resolve the dispute or at least some of the issues (see section 1.1.2.1 below). The taxpayer will be offered the opportunity to have the conference facilitated. Inland Revenue and certain other sources regard conference facilitation as a form of Alternative Dispute Resolution (ADR).⁶

After the conference phase, if certain criteria are met,⁷ the NZ Commissioner and a taxpayer can agree in writing to opt out of the dispute resolution process if they are satisfied that it would be more efficient to have the dispute heard by a court or the Taxation Review Authority (TRA). In addition to meeting the opt-out criteria, the taxpayer must have "participated meaningfully" during the conference phase and must also have signed a declaration that all material

⁴ The majority of disputes are initiated by the NZ Commissioner, for example, when he or she disagrees with a taxpayer's assessment (usually a position taken in the taxpayer's return). The tax dispute resolution procedures are generally similar for both NZ Commissioner-initiated and taxpayer-initiated disputes. However, there are some minor differences. For further information on the respective procedures for NZ Commissioner-initiated disputes and taxpayer-initiated disputes, see Inland Revenue "SPS 16/05: Disputes resolution process commenced by the Commissioner of Inland Revenue" (2016) 28(11) Tax Information Bulletin 14 ["SPS 16/05"] and Inland Revenue "SPS 16/06: Disputes resolution process commenced by a taxpayer" (2016) 28(11) Tax Information Bulletin 50 ["SPS 16/06"].

⁵ TAA 1994, s 89H(3).

⁶ Inspector-General of Taxation *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution: A Report to the Assistant Treasurer* (Sydney, May 2012) at 8, [1.44]; Graham Tubb "Tax Disputes Procedures: A Current Snapshot" (paper presented to the New Zealand Law Society Tax Conference, Auckland, 5 September 2013) 149 at 154; Karen Whitiskie "Five years on for facilitated conferences" (2015) 873 LawTalk 19 at 19; Geoff Clews and Ele Duncan "Audits and Disputes: The Myths, The Realities and The Lessons to be Learnt" (paper presented to the New Zealand Law Society Tax Conference, Auckland, 13 October 2016) 85 at 109.

⁷ For the criteria, see Inland Revenue "SPS 16/05", above n 4, at [167] and Inland Revenue "SPS 16/06", above n 4, at [196].

information has been provided to the NZ Commissioner.⁸ The NZ Commissioner considers that a taxpayer will have participated meaningfully during the conference phase where: (a) the taxpayer has provided information as requested by Inland Revenue (if it has not already been provided prior to the conference phase); and (b) the taxpayer has discussed the contentious facts and issues of the dispute with Inland Revenue.⁹

The NZ Commissioner is required to issue a Disclosure Notice (except where the Commissioner has already issued a notice of disputable decision which includes, or takes account of, the adjustment(s) proposed in the NOPA (NZ)) at the time or after either the NZ Commissioner or the taxpayer issues the NOPA (NZ).¹⁰ Where both parties maintain their position they will be required to issue a Statement of Position (SOP) setting out their final position on the issues. Each SOP must provide an outline of the facts, evidence, issues and propositions of law with sufficient details to support the positions taken.¹¹ The SOPs limit the issues and propositions of law that either party can rely on if the case proceeds to court to what is included in the SOP (also known as the “issues and propositions of law exclusion rule”).¹²

In addition, if the initial adjustment has been proposed by the NZ Commissioner, the TAA 1994 permits the NZ Commissioner to provide additional information in response to any additional matters raised in the taxpayer’s SOP.¹³ This will usually be called an Addendum to the NZ Commissioner’s SOP.¹⁴

There are response periods set out in s 3 of the TAA 1994. These generally require a response within two months of the formal stages during the dispute resolution process discussed above (and four months in relation to a taxpayer wishing to propose an adjustment to any assessment they receive). Agreement may be reached at any stage in the dispute resolution process, but, if the matter remains unresolved, the NZ Commissioner's practice is that generally all matters will be referred to the Disputes Review Unit (DRU (NZ)) (formerly the Adjudication Unit) for adjudication of the disputed issue(s) (see section 1.1.2.2 below).

⁸ Inland Revenue “SPS 16/05”, above n 4, at [164] and Inland Revenue “SPS 16/06”, above n 4, at [193].

⁹ Inland Revenue “SPS 16/05”, above n 4, at [166] and Inland Revenue “SPS 16/06”, above n 4, at [195].

¹⁰ TAA 1994, s 89M. While the disclosure notice may be issued at any time after the NOPA (NZ), it is usually issued at the end of the conference stage. See Inland Revenue *Disputing an assessment: What to do if you dispute an assessment* (IR 776, April 2012) [“IR 776”] at 10 and Inland Revenue *Disputing a notice of proposed adjustment: What to do if Inland Revenue disputes your assessment* (IR 777, January 2012) [“IR 777”] at 8.

¹¹ TAA 1994, s 89M(4), (6).

¹² TAA 1994, s 138G.

¹³ TAA 1994, s 89M(8).

¹⁴ Section 89M(13) of the TAA 1994 also provides that the parties may, at any time, agree to further information being added to either of their SOPs.

As with the conference phase, the adjudication process is not legislated for and is an administrative part of the dispute resolution process. Once a conclusion is reached by the DRU (NZ), the Inland Revenue officer in charge of the dispute will implement any of the DRU's (NZ) decisions, including issuing a notice of assessment to the taxpayer where applicable. If the DRU (NZ) decides the issue in favour of the taxpayer, Inland Revenue has no right of appeal against the decision and the dispute comes to an end. If the decision is in favour of the NZ Commissioner, then the taxpayer can refer the matter to the TRA¹⁵ or the High Court.¹⁶ Where certain grounds are met, decisions of the TRA may be appealed to the High Court¹⁷ and decisions of the High Court may be appealed to the Court of Appeal. Finally, an appeal from the Appeal Court may be appealed to the Supreme Court only with the Supreme Court's leave.

1.1.2 Inland Revenue administrative dispute resolution processes

The two administrative (non-legislated) processes in the New Zealand tax dispute resolution procedures, Inland Revenue conferences and adjudication by Inland Revenue's DRU (NZ), are outlined below in sections 1.1.2.1 and 1.1.2.2, respectively.

1.1.2.1 Inland Revenue conferences

If matters remain in dispute after the filing of the NOPA (NZ) and NOR, parties will generally attend a conference (usually with their legal representatives) to discuss, clarify and try to resolve the differences in their understanding of the various facts and issues.¹⁸ As noted above, the conference phase of the dispute process is an administrative practice and is therefore, not mandatory. However, it is encouraged as a means for resolving disputes, where possible, without the need to proceed to adjudication or court proceedings.

From 1 April 2010 Inland Revenue introduced conference facilitation as a feature in the conference stage of the dispute resolution process. Facilitation is optional for all taxpayers in a dispute with Inland Revenue and a conference can be held without a facilitator. The administration of facilitated conferences is overseen by the Specialist Advice team within

¹⁵ Up until 28 August 2011, there was an option for taxpayers to elect for matters to be heard in the small claims jurisdiction of the TRA. This option was available if the amount of tax in dispute was less than \$30,000 and the taxpayer had made such an election in the NOPA (NZ) or NOR. These disputes were not required to complete the remainder of the dispute process (from the point of election) and no SOP was required to be issued by either party. However, the small claims jurisdiction was removed with effect from 29 August 2011 by section 167 of the Taxation (Tax Administration and Remedial Matters) Act 2011.

¹⁶ For the majority of challenges, the TRA is usually the first forum where proceedings are filed. The TRA is less formal, the cost of hearings is generally lower than in the High Court, TRA hearings are not open to the public and TRA judges are tax specialists. For a further discussion of the differences between the TRA and the High Court forums, see Inland Revenue "IR 776", above n 10, at 21 and Inland Revenue "IR 777", above n 10, at 20.

¹⁷ A decision of the TRA may be appealed to the High Court if it involves: a question of law; or a question of fact, if the amount of disputed tax, duty or tax credit is \$2,000 or more, or if the amount of disputed loss is \$4,000 or more: Taxation Review Authorities Act 1994, s 26.

¹⁸ Inland Revenue "SPS 16/05", above n 4, at [130] and Inland Revenue "SPS 16/06", above n 4, at [159].

Inland Revenue's Investigations and Advice group. Inland Revenue's offer to the taxpayer for facilitation is made in writing within one month from the date of issue of the taxpayer's NOR, or the taxpayer's rejection of the NZ Commissioner's NOR (whichever is applicable).¹⁹

Conference facilitation involves an independent Inland Revenue facilitator who promotes and encourages structured discussion between Inland Revenue officers and the taxpayer on an informed basis and with a bona fide intention of resolving the dispute.²⁰ The facilitator is an Inland Revenue officer, with sufficient technical knowledge, who has not been involved in the dispute or given advice on the dispute prior to the conference stage.²¹ Conference facilitators are selected from Inland Revenue's Office of the Chief Tax Counsel (OCTC), Legal and Technical Services (LTS), Litigation Management Unit and Investigations at the management or senior technical level.²²

The conference facilitator is not responsible for making any decision in respect of the dispute (or settlement), but rather facilitates the discussion and resolution of differences and ultimately determines when the conference phase has come to an end.²³ While conference facilitation is regarded as a form of ADR, it can be distinguished from mediation in the respect that its purpose is not to find a "mediated settlement",²⁴ but rather to allow for the "exchange of material information relating to the dispute."²⁵ If appropriate, the conference facilitator can assist the parties to hold settlement discussions, but this will be separate from any facilitated conference.²⁶ The conference phase is generally expected to be completed within three months, but this may vary depending on the facts and complexities of the specific case.²⁷ There is no charge to the taxpayer for conference facilitation.

¹⁹ Inland Revenue "SPS 16/05", above n 4, at [137] and Inland Revenue "SPS 16/06", above n 4, at [166].

²⁰ Inland Revenue "SPS 16/05", above n 4, at [135] and Inland Revenue "SPS 16/06", above n 4, at [164].

²¹ Inland Revenue "SPS 16/05", above n 4, at [135] and Inland Revenue "SPS 16/06", above n 4, at [164].

²² As at October 2016, Inland Revenue had "some 70 senior experienced staff trained and accredited to carry out facilitations ... the facilitators all underwent training provided by the Arbitrators and Mediators Institute of New Zealand Inc (AMINZ). Once facilitators were sufficiently trained and experienced, they were then accredited as Associate members of AMINZ.": Geoff Clews and Ele Duncan, above n 6, at 109.

²³ Inland Revenue "SPS 16/05", above n 4, at [136] and Inland Revenue "SPS 16/06", above n 4, at [165].

²⁴ Shelley Griffiths "Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process" (paper presented to Australasian Tax Teachers Association Conference, Sydney, 16-18 January 2012) at 11.

²⁵ Inland Revenue "SPS 16/05", above n 4, at [130] and Inland Revenue "SPS 16/06", above n 4, at [159].

²⁶ Whitiskie, above n 6, at 19.

²⁷ Inland Revenue "SPS 16/05", above n 4, at [144] and Inland Revenue "SPS 16/06", above n 4, at [173].

1.1.2.2 Adjudication by the Disputes Review Unit

The DRU (NZ) is part of the OCTC based in Wellington and is part of Inland Revenue's National Office. The DRU (NZ) is separate to Inland Revenue's audit/investigation function and takes a fresh look at the dispute, providing an independent and impartial decision on the issues.²⁸

Each dispute is considered by a team of three people who all have professional legal and/or accounting qualifications and have experience in researching and analysing tax issues.²⁹ The team members have differing levels of seniority and involvement in the consideration of the dispute.³⁰ The final adjudication decision is made by a Disputes Review Manager. The adjudication team takes into account all evidence sent through to the DRU (NZ) at the time of the referral. This can include the "NOPA, NOR, notice rejecting the NOR, conference notes, both parties' SOP, additional information, material evidence including expert opinions ... and any recordings of discussions held during the conference."³¹ Generally the adjudication team considers the dispute based on the materials provided and does not usually conduct further investigation into the matter.

A comprehensive adjudication report is produced and provided to the parties.³² In addition to providing the adjudication decision and the reasons for that decision, the report also sets out the facts of the dispute, the issues that need to be addressed, the analysis of the legal issues involved, the application of that legal analysis to the facts of the dispute and the conclusions reached on each issue.³³ A letter setting out a summary of the report is also sent to both parties. Any necessary assessments or amended assessments are made as directed by the Disputes Review Manager.³⁴ As stated in section 1.1.1 above, if the DRU (NZ) decides in favour of the taxpayer, Inland Revenue has no right of appeal against the DRU's (NZ) decision. However, if the taxpayer is dissatisfied with the DRU's (NZ) decision, they may start proceedings before the TRA or the High Court. Taxpayers have two months from the date of the notice of assessment or amended assessment to file proceedings.³⁵

²⁸ Inland Revenue "SPS 16/05", above n 4, at [252] and Inland Revenue "SPS 16/06", above n 4, at [275].

²⁹ Inland Revenue "The Disputes Review Unit - its role in the dispute resolution process" (14 July 2015) <<http://www.ird.govt.nz/technical-tax/general-articles/ga-adjudication-unit.html>> (last accessed 7 November 2016).

³⁰ Inland Revenue, above n 29.

³¹ Inland Revenue "SPS 16/05", above n 4, at [258] and Inland Revenue "SPS 16/06", above n 4, at [284].

³² While adjudication reports are utilised internally by Inland Revenue as precedents for future matters, the general body of taxpayers has no such access to these reports (even in redacted form): Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH, Auckland, 2012) at 234.

³³ Inland Revenue, above n 29.

³⁴ Inland Revenue "SPS 16/05", above n 4, at [271]; Inland Revenue "SPS 16/06", above n 4, at [295].

³⁵ Inland Revenue "SPS 16/05", above n 4, at [270] and Inland Revenue "SPS 16/06", above n 4, at [294].

Unlike conference facilitation, adjudication by the DRU (NZ) does not fall within the definition of ADR used in this study, “an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.”³⁶ This is because, notwithstanding that the adjudicator is an impartial Inland Revenue officer who is independent of Inland Revenue’s audit function, the two parties do not appear before the adjudicator in person. Thus, the adjudicator’s decision is made solely “on the papers.”³⁷ Furthermore, the DRU (NZ) does not perform a mediation or arbitration function.

The DRU (NZ) does not have any direct communication with either the Inland Revenue officers or the taxpayer involved in the dispute during the course of the adjudication. To maintain transparency and independence, the Senior Technical and Liaison Officer (also part of the OCTC) handles any necessary correspondence or other communication between the adjudication team and either of the parties.³⁸ Thus, the DRU (NZ) operates “impartially and independently.”³⁹ There is no charge for the review of a dispute by the DRU (NZ).

1.1.3 Alternative dispute resolution during the litigation stage

At the litigation stage of tax disputes, ADR is theoretically available to parties in the TRA and the High Court. The District Court Rules 2014⁴⁰ and the High Court Rules 2016 both contemplate that where the question of settlement is raised in the course of case management, the practice is usually to inquire of the parties as to whether they wish to attend a private mediation. If they do not, then consideration is given to allocating a judicial settlement conference.⁴¹ Rule 7.2(3)(d) of the District Court Rules 2014 provides that if a short trial is not allocated, a judicial settlement conference must be held unless: (i) the Judge directs otherwise; or (ii) the parties agree to participate in ADR. Rule 7.79(5) of the High Court Rules 2016 provides that a Judge may, with the consent of the parties, make an order at any time directing

³⁶ National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016) at 4.

³⁷ Keating, above n 32, at 230. See also, Inland Revenue “SPS 16/05”, above n 6, at [263] and Inland Revenue “SPS 16/06”, above n 6, at [289].

³⁸ Inland Revenue, above n 29.

³⁹ Inland Revenue, above n 29.

⁴⁰ Regulation 4 of the Taxation Review Authorities Regulations 1998 provides that the District Court Rules 2009 (replaced by the District Court Rules 2014 on 1 July 2014) apply to the commencement, interlocutory steps, and conduct of proceedings in the TRA as if those proceedings were civil proceedings in the District Court to the extent that they are not inconsistent with the Taxation Review Authorities Regulations 1998, the Taxation Review Authorities Act 1994 or the TAA 1994.

⁴¹ Courts of New Zealand *Judicial Settlement Conferences: High Court Guidelines* (April 2012) at [1.4].

the parties to attempt to settle their dispute by the form of mediation or other ADR (to be specified in the order) agreed to by the parties.⁴²

Rule 7.3 of the District Court Rules 2014 and rule 7.79(1) of the High Court Rules 2016 allow a Judge to, at any time before the hearing of a proceeding, convene a conference of the parties in chambers for the purpose of negotiating for a settlement of the proceeding or of any issue, and to assist in those negotiations. However, a Judge who presides at a conference generally may not preside at the hearing of the proceeding unless all parties taking part in the conference consent and the Judge is satisfied there are no circumstances that would make it inappropriate for the Judge to do so.⁴³ Rule 7.79(3) of the High Court Rules 2016 further provides that a Judge may, at any time during the hearing of a proceeding, with the consent of the parties, convene a conference of the parties for the purpose of negotiating for a settlement of the proceeding or of any issue.

Judicial settlement conferences can take various forms.⁴⁴ With respect to judicial settlement conferences in the context of the TRA and the High Court, “the judges’ role is expressly provided to be one of assisting the parties in the negotiation of a settlement of the proceeding or of any of the issues in the proceeding.”⁴⁵ The judge does not provide an evaluation or an opinion of the successful outcome of the litigation.⁴⁶ It thus follows that judicial settlement conferences in the TRA and the High Court fall within the definition of ADR (stated above in section 1.1.2.2) used in this study.

⁴² Arbitration is also potentially available in the High Court under r 7.80 of the High Court Rules 2016.

⁴³ High Court Rules 2016, r 7.79(2); District Court Rules 2014, r 7.3(6).

⁴⁴ For a further discussion on variations in judicial settlement conferencing, see Tania Sourdin “Five Reasons Why Judges Should Conduct Settlement Conferences” (2011) 37 Mon LR 145.

⁴⁵ Courts of New Zealand, above n 41, at [2.1]. See also, John Faire, Tom Ingram and Helen Rice “Judicial Settlement Conferences: A 360° Perspective” (New Zealand Law Society Seminar, Wellington, 10 November 2008).

⁴⁶ Courts of New Zealand, above n 41, at [2.2].

Appendix 1.2: The Australian Tax Dispute Resolution Procedures

1.2.1 The Australian tax dispute resolution procedures: Overview¹

Under the current self-assessment system in Australia, most Australian taxpayers have an obligation to provide the details of their taxable income, in the form of an annual tax return. On this basis, the Australian Commissioner of Taxation (the Australian Commissioner) is required to raise an assessment under section 161 of the Income Tax Assessment Act 1936 (Cth) (ITAA 1936 (Cth)), and to provide that assessment to the taxpayer. Where there is a tax debt, the taxpayer is obliged to pay that debt by the due date. Otherwise, where there is a tax refund due, that amount will be repaid by the Australian Taxation Office (ATO).

A tax dispute occurring between a taxpayer and the ATO would typically commence at the point at which the assessment is under review. There may be an audit of the taxpayer's affairs or a post-assessment review of their affairs. Thus, in the review period following self-assessment, an informal dispute may be considered as occurring.² If this dispute cannot be resolved, an amended assessment will be issued by the ATO, with the result of amended taxable income. At this point, a dissatisfied taxpayer may formally lodge an objection in accordance with Part IVC of the Taxation Administration Act 1953 (Cth) (TAA 1953 (Cth)).³ The tax dispute is said to have formally commenced at this stage.

An objection must be lodged with the Australian Commissioner within two years of the Australian Commissioner's assessment (or other taxation decision)⁴ for most individuals and very small business taxpayers, within four years for taxpayers with more complex affairs (or in the case of companies, superannuation funds, approved deposit funds (ADFs) and pooled superannuation trusts (PSTs), four years after the deemed service of the deemed notice of assessment) or within 60 days for all other cases.⁵ Where a valid objection to an assessment or other taxation decision has been lodged by the taxpayer, an internal review of the assessment

¹ The material in Appendix 1.2 was reviewed by Michael Walpole (Professor and Head of School, School of Taxation and Business Law (incorporating Atax), University of New South Wales Business School) on 9 July 2014. The researcher is grateful for his feedback.

² The ATO's Code of Settlement states that settlement negotiations or offers can be initiated by any party to the dispute and they can occur at any stage, including prior to assessments being raised: Australian Taxation Office "Practice Statement Law Administration 2015/1: Code of settlement" (2015) <<http://law.ato.gov.au/atolaw/view.htm?docid=%22PSR%20PS20151%20FNAT%20FATO%20F00001%22>> (last accessed 7 November 2016) ["PS LA 2015/1"] at [4]. The usual form of the agreement is a Deed of Settlement, which includes, inter alia, an obligation of the taxpayer not to object to or appeal against the assessments agreed under the settlement: at [8].

³ Certain decisions of the Australian Commissioner which do not actually relate to the assessment or calculation of tax, such as the exercise of one of the Australian Commissioner's many discretions, may be reviewed under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

⁴ A "taxation decision" includes an initial assessment issued by the ATO, amended assessment, determination, private ruling or other decision of the ATO: TAA 1953 (Cth), s 14ZQ.

⁵ TAA 1953 (Cth), s 14ZW.

will be conducted by an ATO officer who is a separate from the ATO officer which made the initial taxation decision.⁶ As from 1 July 2015, the objection officer will be from the ATO's Review and Dispute Resolution (RDR) business line.⁷ Note that the internal review relates to matters raised in that objection, and not in respect of the entire assessment.⁸

Sixty days must pass before the taxpayer can demand a decision to the objection. If no objection decision is provided after 60 days, s 14ZYA(2) of the TAA 1953 (Cth) permits the taxpayer to make a written request to the Australian Commissioner for an objection decision within a further 60 days. If no decision is made within 60 days of the Australian Commissioner receiving that notice, the Australian Commissioner is deemed to have disallowed the objection.⁹ A deemed disallowance is subject to review or appeal in the same way as any other objection decision.

A taxpayer dissatisfied with the Australian Commissioner's objection decision, (for example, a decision to disallow or only allow in part an objection), has the option of either applying to the Administrative Appeals Tribunal (AAT) for a review of the decision or appealing to the Federal Court of Australia, within 60 days of being served with a notice of the objection decision.¹⁰

The AAT was established by the Administrative Appeals Tribunal Act 1975 (Cth) (AATA 1975 (Cth)) and may exercise all the powers and discretions of the Australian Commissioner, but only for the purposes of reviewing the Australian Commissioner's objection decision. The AAT may confirm, vary or set aside the Australian Commissioner's objection decision. However, the AAT does not have the power to actually make, amend or set aside an assessment. Up until 1 July 2015, if the amount of tax in dispute was under \$A5,000, an application for review by the AAT could be made to be heard by the Small Taxation Claims Tribunal (STCT) rather than the Taxation Appeals Division (TAD)¹¹ of the AAT. The STCT was intended to provide a cheaper and less formal means of resolving tax disputes, in particular by encouraging

⁶ Australian Taxation Office "How we deal with your objection" (1 November 2016) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Object-to-an-ATO-decision/How-we-deal-with-your-objection/>> (last accessed 7 November 2016).

⁷ The RDR business line is part of the ATO's Law Design and Practice group and was established to oversee and manage disputes. RDR is led by the Deputy Commissioner: Debbie Hastings "Reinventing the way we manage tax disputes" (speech to the Tax Institute of Australia Financial Services Conference 2015, Surfers Paradise, 20 February 2015).

⁸ Binh Tran-Nam and Michael Walpole "Independent tax dispute resolution and social justice in Australia" (2012) 35(2) UNSWLJ 470 at 481.

⁹ TAA 1953 (Cth), s 14ZYA(3).

¹⁰ TAA 1953 (Cth), ss 14ZZC and 14ZZN.

¹¹ Now referred to as the Taxation and Commercial Division: Tribunals Amalgamation Act 2015 (Cth), s 17A.

mediation.¹² The Tribunals Amalgamation Act 2015 (Cth) abolished the concept of the STCT as part of an amalgamation of the AAT. Applications that were dealt with in the STCT are now heard by the Taxation and Commercial Division of the AAT. However, the lower application fee that was payable in relation to applications of that kind has been maintained.

The Australian Commissioner or the taxpayer may appeal to the Federal Court from a decision of the AAT on a question of law only. The appeal is restricted to that question of law and does not amount to a fresh hearing of the matter. An appeal to the Federal Court is heard by a single judge (unless a judge of the Federal Court presided in the AAT in which case the appeal must be heard by a full bench of the Federal Court) and the Federal Court may make any order as it thinks fit, including an order confirming or varying the decision, although it cannot actually amend an assessment.¹³ If dissatisfied with the Federal Court's decision, the taxpayer or the Australian Commissioner can appeal against the decision to the full Federal Court (unless it has already sat in the circumstances outlined in parenthesis above), and ultimately, with leave, to the High Court of Australia.

1.2.2 Australian Taxation Office alternative dispute resolution

Sections 1.2.2.1 and 1.2.2.2 outline Alternative Dispute Resolution (ADR) in the ATO generally and the ATO in-house facilitation process, respectively.

1.2.2.1 Alternative dispute resolution in the Australian Taxation Office generally

The ATO's Practice Statement Law Administration 2013/3 (PS LA 2013/3)¹⁴ states that: "When disputes cannot be resolved by early engagement and direct negotiation, the ATO is committed to using ADR where appropriate to resolve disputes."¹⁵ PS LA 2013/3 provides that, although there is no optimal time for ADR, it may potentially be appropriate: after the ATO issues a position paper during an audit; during a review at the objection stage before a final decision is made by an ATO officer; or during the litigation stage.¹⁶

The ATO's obligations with respect to ADR come from a number of sources. Commonwealth agencies and their legal services providers have an obligation under Appendix B to the

¹² CCH *Australian Master Tax Guide 2015* (56th ed, CCH, Sydney, 2015) at [¶28-090]. For further details on the differences between the former STCT and TAD divisions of the AAT, see Tran-Nam and Walpole, above n 8, at 483-484.

¹³ TAA 1953 (Cth), s 14ZZP.

¹⁴ Australian Taxation Office "Practice Statement Law Administration 2013/3: Alternative Dispute Resolution (ADR) in ATO Disputes" (2013) <<http://law.ato.gov.au/atolaw/view.htm?locid=PSR/PS20133/NAT/ATO>> (last accessed 7 November 2016) ["PS LA 2013/3"] provides instruction to ATO personnel on what policies and guidelines must be followed when attempting to resolve or limit disputes by means of ADR.

¹⁵ At [5].

¹⁶ At [17].

Attorney-General's Legal Services Directions 2005 (Cth)¹⁷ to act as model litigants in the conduct of litigation and in ADR. The model litigant obligation requires agencies to endeavour where possible to avoid, prevent and limit the scope of legal proceedings by considering ADR before initiating legal proceedings and by participating in ADR where appropriate. The requirement to consider ADR is a continuing obligation from the time litigation is contemplated and throughout the course of litigation.¹⁸

Parties to tax disputes under review in the Federal Court of Australia are obliged under the Civil Dispute Resolution Act 2011 (Cth) to file “genuine steps” statements outlining what steps they have taken to resolve their dispute or the reasons why they have not taken any.¹⁹ Hence, the Act encourages parties to take genuine steps to resolve a dispute (including in tax and superannuation disputes) before commencing legal proceedings in the Federal Court of Australia. Genuine steps that may be taken to resolve a dispute include considering whether the dispute can be resolved by an ADR process.²⁰

The basis for the ATO’s settlement of tax disputes is set out in the ATO’s Code of Settlement.²¹ Settling disputed matters is consistent with good management of the tax system, overall fairness and best use of ATO and other community resources.²² This has become known as “the good management rule”, which has been endorsed by the courts and is reinforced by the Public Governance, Performance and Accountability Act 2013 (Cth). It imposes an obligation on the Australian Commissioner to manage the affairs of the ATO in a way that promotes the efficient, effective and ethical use of Commonwealth resources. The Code of Settlement provides that ADR approaches, including mediation, may be used as part of settlement negotiations.²³

ADR is generally initiated by agreement between the parties. PS LA 2013/3 provides that ATO personnel involved in disputes should “actively look for opportunities where ADR can help to

¹⁷ Issued under the Judiciary Act 1903 (Cth), s 55ZF.

¹⁸ Legal Services Directions 2005 (Cth), Appendix B, ss 5.1 and 2(e)(iii).

¹⁹ Civil Disputes Resolution Act 2011 (Cth), ss 6 and 7.

²⁰ Civil Disputes Resolution Act 2011 (Cth), s 4(1)(d).

²¹ Australian Taxation Office “PS LA 2015/1”, above n 2 and Australian Taxation Office “Code of settlement” (18 August 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Settlement/Code-of-settlement/>> (last accessed 7 November 2016). See also, Australian Taxation Office “Practical guide to the ATO Code of settlement” (21 August 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Settlement/A-practical-guide-to-the-ATO-code-of-settlement/>> (last accessed 7 November 2016).

²² Australian Taxation Office “PS LA 2015/1”, above n 2, at [3]; Australian Taxation Office “Code of Settlement”, above n 21, at [3].

²³ Australian Taxation Office “PS LA 2015/1”, above n 2, at [4]; Australian Taxation Office “Code of Settlement”, above n 21, at [4];

resolve or progress the dispute.”²⁴ Any opportunities identified should be discussed with the relevant manager(s) and appropriate technical staff (including RDR officers) before approaching the taxpayer or their advisors.²⁵

Taxpayers can also request ADR. Requests should usually be directed to the tax officer managing the dispute, who will discuss the request with the relevant manager(s) and appropriate technical staff (including RDR officers) before responding.²⁶ If ADR is requested by a taxpayer and the ATO considers that ADR is not appropriate, the ATO will communicate the reasons to the taxpayer.²⁷

If parties choose to participate in ADR, they will need to decide on the type of ADR process which will best suit their needs and the context of the dispute. PS LA 2013/3 classifies, and provides examples of, the ADR processes that may generally be employed. These processes are: facilitative (for example, mediation), advisory (for example, early neutral evaluation (ENE) or case appraisal) or determinative (for example, expert determination or arbitration).²⁸ Blended processes where the ADR practitioner plays multiple roles may also be utilised (for example, conferencing or conciliation).²⁹

For ADR processes other than those conducted by the AAT or the Federal Court of Australia, the ADR practitioner’s fees are ordinarily shared between the parties.³⁰ ATO RDR officers can assist in the selection and engagement of external ADR practitioners (who are usually former Federal Court or High Court judges).³¹ Taxpayers’ review and appeal rights are unaffected by participating in ADR, subject to the terms of any settlement reached and compliance with the legislative timeframes.³² Unless the parties agree otherwise, all ADR processes are conducted in a confidential and on a “without prejudice” basis.³³ Any communications between parties for the purposes of an ADR process is privileged and cannot be used in legal proceedings without the consent of the other party.³⁴

²⁴ Australian Taxation Office “PS LA 2013/3”, above n 14, at [20].

²⁵ At [20].

²⁶ At [21].

²⁷ At [22].

²⁸ At [23]. However, arbitration is regarded as “generally not appropriate for tax disputes”: at [24].

²⁹ At [23].

³⁰ At [30].

³¹ At [32].

³² At [52].

³³ At [41].

³⁴ At [42].

1.2.2.2 Australian Taxation Office in-house facilitation process

During November 2012 to April 2013 the ATO conducted an ADR facilitation pilot using ATO facilitators to resolve smaller and less complex indirect tax objections involving issues such as substantiation and penalties. The pilot implemented a recommendation made by the Inspector-General of Taxation (IGT) in May 2012 in his *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution*.³⁵ Following a review of the pilot, with effect from 1 April 2014, the ATO rolled out the use of facilitation for a range of disputes arising from audits and objections in indirect tax, small business and individual taxpayers, and private groups and high wealth individuals.³⁶

ATO facilitation is a process where “an impartial ATO facilitator meets with the taxpayer/their agent and the ATO case officers to identify issues in dispute, develop options, consider alternatives, and attempt to reach an agreement.”³⁷ The facilitators are ATO officers who have been trained in facilitation and mediation techniques but are not usually accredited mediators. The facilitator will also not have had any previous involvement in the dispute. The ATO state that “the facilitator will not establish facts, take sides, give advice, make a decision or decide who is ‘right or wrong.’”³⁸ The role of the facilitator is to guide the parties through the process and assist them to ensure that there are open lines of clear communication, and messages are correctly received.

Facilitations are usually held face-to-face, although in some instances it may be necessary to conduct a facilitation by telephone or video link. Facilitation may be particularly appropriate if other direct means of discussing and resolving a dispute with the taxpayer have failed.³⁹ In such situations the ATO officers responsible for the taxpayer’s audit or objection may consider whether facilitation would be “a proportionate and appropriate response in the context of the dispute.”⁴⁰ Taxpayers are not obliged to participate in facilitation if it is offered by the ATO. Taxpayers may also request facilitation (by email) to resolve their dispute after discussing their request with the ATO officer responsible for their audit or objection, or to their manager. There is no charge to taxpayers for the ATO facilitation service. However, taxpayers may choose to have representation at the facilitation at their own cost.

³⁵ Inspector-General of Taxation *Review into the Australian Taxation Office's Use of Early and Alternative Dispute Resolution: A Report to the Assistant Treasurer* (Sydney, May 2012) at 44, [3.99].

³⁶ Australian Taxation Office “In-House facilitation” (19 November 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/In-house-Facilitation/>> (last accessed 7 November 2016).

³⁷ Australian Taxation Office, above n 36.

³⁸ Australian Taxation Office, above n 36.

³⁹ Australian Taxation Office, above n 36.

⁴⁰ Australian Taxation Office, above n 36.

If a resolution is reached at the facilitation, the facilitator will assist the taxpayer and the ATO officers to record the terms of any agreement. If the dispute is not resolved, taxpayers' review and appeal rights are unaffected by participating in the facilitation process, subject to complying with the normal timeframes.

1.2.3 Alternative dispute resolution during the litigation stage

As outlined in PS LA 2013/3, parties to a tax dispute may participate in ADR during the litigation stage.⁴¹ Both the AAT and Federal Court of Australia can direct the ATO and the taxpayer to participate in certain ADR proceedings.⁴² Furthermore, the Civil Dispute Resolution Act 2011 (Cth) requires all parties appearing at the Federal Court of Australia to demonstrate to the satisfaction of the judge that they have taken genuine steps (which can include the consideration of ADR) to resolve their dispute before coming to a formal hearing before the Court.⁴³ The following sections outline the ADR processes available in the AAT (section 1.2.3.1) and in the Federal Court of Australia (section 1.2.3.2).

1.2.3.1 Administrative Appeals Tribunal

The AATA 1975 (Cth) was amended effective from 16 May 2005 to include ADR provisions. Section 3(1) of the amending legislation defines "alternative dispute resolution processes" to include conferencing, mediation, neutral evaluation, case appraisal, conciliations and procedures or services specified in the regulations. However, specifically excluded from ADR in the AAT are arbitration and court procedures or services.⁴⁴

ADR in the AAT includes the Tribunal's routine practice of referring all matters to a conference moderated by a Conference Registrar.⁴⁵ Such conference may be held in person or conducted over the phone. The process encourages the parties to explore the issues in dispute and evidentiary requirements whilst assessing settlement possibilities. The Conference Registrars typically assess the suitability of a matter for any further ADR processes in the AAT.

ADR processes may be conducted by a member or officer of the AAT or a person engaged for the purpose and considered to be suitable by the Registrar.⁴⁶ Parties will not incur any costs of the ADR unless an external ADR practitioner is requested by the parties.

⁴¹ Australian Taxation Office "PS LA 2013/3", above n 14, at [17].

⁴² AATA 1975 (Cth), s 34A; Federal Court of Australia Act 1976 (Cth), s 53A.

⁴³ Civil Disputes Resolution Act 2011 (Cth), ss 6 and 7.

⁴⁴ AATA 1975 (Cth), s 3(1)(g), (h).

⁴⁵ AATA 1975 (Cth), s 34A.

⁴⁶ AATA 1975 (Cth), ss 34A and 34H.

If a dispute remains unresolved following a conference and/or other ADR process in the AAT, it will generally proceed to an AAT hearing. Any admissions or representations made during the ADR process are inadmissible at the hearing, with an exception of a case appraisal report or a neutral evaluation report which can be admitted into evidence subject to any objections from the parties.⁴⁷ A tribunal member involved in the ADR process may sit on a final hearing of the matter, subject to any objections from the parties.⁴⁸

1.2.3.2 Federal Court of Australia

Section 53A of the Federal Court of Australia Act 1976 (Cth) allows the Court to refer any proceedings or part of proceedings to arbitration, mediation or “an alternative dispute resolution process.”⁴⁹ However, the Federal Court will not refer proceedings to arbitration without the consent of the parties. Part 28 of the Federal Court Rules 2011 (Cth) addresses ADR in the Federal Court. Rule 28.01 provides that parties must and the Court will, consider ADR, as early as practicable and r 28.02 allows a party to apply to the Court to be referred to ADR.

Mediation is the most commonly used ADR process in taxation disputes in the Federal Court. Most mediations are conducted by Registrars. However, occasionally the Court will refer the case to an external lawyer to conduct the mediation. Where the mediation is conducted externally the parties will pay the agreed fee to the mediator. Section 53B of the Federal Court of Australia Act 1976 (Cth) provides that words said or admissions made at conferences conducted by a mediator are not admissible in any court. Where a part of the case is settled at mediation, r 28.23 of the Federal Court Rules 2011(Cth) allows the mediator to report to the Court only on the agreement reached between the parties. At the end of the mediation the only other record of the mediation kept by the Court is a note that the mediation took place.

1.2.4 Other Australian Taxation Office dispute resolution initiatives

The following sections outline a number of other ATO dispute resolution initiatives. These include the ATO’s Disputes Policy and Dispute Management Plan (section 1.2.4.1) as well as ATO processes which are aimed at early engagement and resolution of disputes: ATO independent review (section 1.2.4.2), the early assessment and resolution (EAR) process in AAT disputes (section 1.2.4.3); and the early engagement process for large business taxpayers (section 1.2.4.4).

⁴⁷ AATA 1975 (Cth), s 34E.

⁴⁸ AATA 1975 (Cth), s 34F.

⁴⁹ Non-binding ENE is an example of “an alternative dispute resolution process” contemplated under s 53A of the Federal Court of Australia Act 1976 (Cth) used in practice in the Federal Court of Australia.

1.2.4.1 Australian Taxation Office Disputes Policy and Dispute Management Plan

In September 2012 the ATO published a Disputes Policy⁵⁰ which “aims to provide a coordinated and consistent approach to managing disputes” and is the supporting document for the ATO’s Dispute Management Plan.⁵¹ By providing information in the Disputes Policy about their overall approach to dispute management and how they deal with specific types of disputes (including tax and superannuation disputes), the ATO aims to promote a resolution culture based on the following aspects: effective communication; genuine engagement; collaboration; and strategies that are fair and proportionate to the matters in dispute and lead to early resolution at minimal cost.⁵²

In November 2012 the ATO published its first *Dispute Management Plan 2012-13*⁵³ in response to a recommendation by the National Alternative Dispute Resolution Advisory Council (NADRAC) for all Commonwealth agencies to have such a plan in place.⁵⁴ The Dispute Management Plan is the cornerstone for dispute management across the ATO and applies to all disputes at any stage within the ATO. The annually reviewed Dispute Management Plan sets out the following objectives and key dispute management principles of the ATO.⁵⁵

Objectives:

- Faster and earlier resolution of disputes;
- Reduce the number of disputes;
- Lower your costs and our costs;
- Enhance our relationship with the community;
- Make your interactions with us easier

Key Principles:

- Avoid disputes where possible;

⁵⁰ Australian Taxation Office “Disputes policy” (7 September 2015) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Resolving-disputes/Disputes-policy/>> (last accessed 7 November 2016).

⁵¹ Australian Taxation Office *Dispute management plan 2013-14* (Canberra, January 2014).

⁵² Australian Taxation Office, above n 50.

⁵³ Australian Taxation Office *Dispute management plan 2012-13* (Canberra, October 2012).

⁵⁴ See National Alternative Dispute Resolution Advisory Council *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Barton, 2009) <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016) at 120.

⁵⁵ Australian Taxation Office, above n 51.

- Resolve disputes in the simplest and most cost-effective manner taking into account the merits and the risks;
- Resolve disputes as early as possible;
- Clarify disputes by listening to each other's views and considering all resolution options;
- Manage disputes in a courteous and fair manner.

The ATO has not released a Dispute Management Plan subsequent to the 2013-14 plan. Personal correspondence by the researcher with an ATO RDR Director indicates that there are currently no plans by the ATO to update the Dispute Management Plan as “the view is that the content from this plan has been rolled up into general dispute management information available on the website.”⁵⁶

Both the Disputes Policy and Dispute Management Plan reflect the ATO's “intention to continue the shift away from adversarial processes, such as litigation, to resolve disputes.”⁵⁷ The ATO believe that ongoing dialogue is essential to effective management of disputes. It promotes a complete understanding of the facts and circumstances of the dispute. It also provides an opportunity for both sides to explain their views and discuss what options are available to resolve or limit the scope of the dispute, or remove any blockers to its progress. As noted in section 1.2.2.1 above, where appropriate, the ATO will use ADR at any stage to resolve the dispute and avoid litigation. However, they “recognise the importance of judicial involvement in some cases.”⁵⁸

1.2.4.2 Australian Taxation Office independent review

The independent review function took effect from 1 July 2013 and is headed by the Deputy Commissioner, RDR. The process is available during the audit stage of the dispute resolution procedures. Large business taxpayers (taxpayers with an annual turnover greater than \$A250 million) can request an independent review if they disagree with some or all of a Statement of Audit Position received from the ATO regarding income tax, excise, goods and services tax (GST), or other forms of tax.⁵⁹ Taxpayers have 10 working days from when they receive the ATO's Statement of Audit Position to request in writing (including by email) an independent

⁵⁶ Email from [redacted] (Director, [redacted], Australian Taxation Office) to Melinda Jone regarding the ATO Dispute Management Plan (30 June 2015).

⁵⁷ Australian Taxation Office, above n 50.

⁵⁸ Australian Taxation Office, above n 50.

⁵⁹ Australian Taxation Office “Independent review of the Statement of Audit Position for groups with a turnover greater than \$250m” (7 June 2016) <[https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/in-detail/avoiding-and-resolving-disputes/independent-review/independent-review-of-the-statement-of-audit-position-for-groups-with-a-turnover-greater-than-\\$250m/](https://www.ato.gov.au/general/dispute-or-object-to-an-ato-decision/in-detail/avoiding-and-resolving-disputes/independent-review/independent-review-of-the-statement-of-audit-position-for-groups-with-a-turnover-greater-than-$250m/)> (last accessed 7 November 2016).

review. An independent review may only be requested once for each Statement of Audit Position issued.

In an independent review, an independent technical officer outside of the audit area reviews the technical merits of the case prior to finalisation of the ATO audit position. The independent review is conducted by a senior officer from the ATO's RDR business line (which is separate from the ATO's Client Engagement group).⁶⁰ The ATO officer will not have been previously involved in the audit and will bring an independent "fresh set of eyes" to the review.⁶¹ The independent reviewer will consider the merits of the case on the basis of the information already available to the Australian Commissioner. The independent reviewer generally will not consider new information submitted by the taxpayer.

The independent review process also involves the independent reviewer conducting a case conference. A case conference is an informal meeting which provides an opportunity for the independent reviewer to discuss the issues with the taxpayer and the ATO audit team. It allows the independent reviewer to: confirm the agreed facts; determine and, if possible, narrow down the specific areas of disagreement; and ask questions to clarify issues giving rise to disagreement.⁶² The independent reviewer will not provide any observations, recommendations or preliminary conclusions during the case conference. The focus of the case conference is to discuss and clarify matters raised at audit for the benefit of the independent reviewer. Thus, the case conference "is not an ADR forum nor is it a forum to consider whether ADR is appropriate or available."⁶³

The outcome of the independent review process is in the form of recommendations on what the independent reviewer considers is the better view of the facts and the application of the law to those facts. The independent reviewer will provide the taxpayer with a letter setting out the recommendations in relation to the ATO audit team's Statement of Audit Position. The recommendations may also include the reviewer's suggestions about the way the parties might attempt to resolve any remaining dispute, including through formal ADR. Independent reviews are generally required to be completed within 12 weeks. Once the independent review is finalised, the ATO audit team will complete the audit in accordance with the independent reviewer's recommendations.

⁶⁰ Prior to February 2016, the ATO's Client Engagement group was known as the Compliance group.

⁶¹ Australian Taxation Office, above n 59.

⁶² Australian Taxation Office, above n 59.

⁶³ Australian Taxation Office, above n 59.

1.2.4.3 Early assessment and resolution process in Administrative Appeals Tribunal disputes

The early assessment and resolution (EAR) process was introduced in July 2013 and is applied to all cases that are lodged with the AAT.⁶⁴ Specialist senior ATO officers examine each new application to the AAT to look for opportunities to resolve the matter without a lengthy or costly tribunal process, saving resources for all parties. The process focuses on early engagement with the taxpayer (preferably in person), to listen, discuss and accept evidence of events where appropriate. The officer will also engage with other stakeholders in the ATO in attempt to resolve the dispute. The primary objective of the process is to bring forward resolution of disputes to an earlier point and prior to intensive and costly preparation by both parties. Where complete resolution is not achieved, the process aims to identify and narrow the issues in dispute, and ensure that only the right matters proceed to hearing without delay. Formal ADR processes may also be considered where attempts at direct negotiation have not resolved the matter.

1.2.4.4 Early engagement for large business taxpayers

The early engagement process, available from 1 November 2013, was established by the ATO to provide large business taxpayers with an opportunity to meet with the ATO prior to making a decision on whether to lodge an amendment or objection request.⁶⁵ Early engagement is available for large business taxpayers who want to: correct an error they have made on a previously lodged income tax return; change a technical position they have adopted in an income tax return; or object to the assessment they have received for an income tax return.⁶⁶ Large business taxpayers can request an early engagement meeting by email. The request must include a brief summary of what the taxpayer wants to be corrected or changed, and why.⁶⁷

The early engagement approach “ensures that the right people are brought together to discuss how best to deal with the correction or change” and “it is expected that it will assist with faster resolution.”⁶⁸ No binding opinions are given during the course of the early engagement. If it is agreed that seeking an amendment is the best option, the ATO officer involved in the early engagement will forward the taxpayer’s amendment request to the appropriate area without the need for the taxpayer to re-apply. If it is decided that lodging an objection is the better approach,

⁶⁴ Australian Taxation Office “Early assessment and resolution” (26 May 2014) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Litigation/Early-assessment-and-resolution/>> (last accessed 7 November 2016).

⁶⁵ Australian Taxation Office “Early engagement – what to expect” (5 October 2016). <<https://www.ato.gov.au/Business/Large-business/Objections-and-amendments/Early-engagement---what-to-expect/>> (last accessed 7 November 2016).

⁶⁶ Australian Taxation Office, above n 64.

⁶⁷ Australian Taxation Office, above n 64.

⁶⁸ Australian Taxation Office, above n 64.

the ATO officer will discuss with the taxpayer the information that the ATO will require to progress the objection. The ATO expect that only one early engagement meeting will be needed and that it will occur within two to three weeks of the ATO receiving a request for early engagement.⁶⁹

⁶⁹ Australian Taxation Office, above n 64.

Appendix 1.3: The United Kingdom's Tax Dispute Resolution Procedures

1.3.1 The United Kingdom tax dispute resolution procedures: Overview¹

The current self-assessment system in the United Kingdom (UK) requires certain taxpayers to file tax returns providing details of their taxable income by 31 October following the tax year (or 31 January for online returns).² Based on the information reported by the taxpayer, HM Revenue and Customs (HMRC) will calculate the tax they owe (or any repayments due, if applicable). HMRC carries out compliance checks (also known as enquiries) to make sure a specific tax return or claim is correct and/or to check that any payments are for the right amount and are made on time.³ Disputes between HMRC and a taxpayer can arise when there is a difference in view between HMRC and a taxpayer during a HMRC compliance check.⁴

HMRC complete a compliance check by either sending the taxpayer one or more decision notices or by agreeing a contract settlement⁵ with the taxpayer. A decision notice can be any one of the following:⁶

- an assessment or amendment to an assessment;
- a penalty notice if a penalty is due;
- a letter setting out what the final position is.

When HMRC issue a decision notice, they will also notify the taxpayer whether the decision can be appealed against and if so, how to appeal and what time limits apply. Taxpayers who disagree with a direct tax decision of HMRC have 30 days from the date of the decision to appeal in writing to HMRC against it (and include an explanation of what they disagree with

¹ The material in Appendix 1.3 was reviewed by Lynne Oats (Professor of Taxation and Accounting, University of Exeter Business School and Deputy Director, Tax Administration Research Centre) on 16 July 2014 and Philip Baker QC (Barrister, Field Court Tax Chambers, Gray's Inn, London and Senior Visiting Fellow at the Institute of Advanced Legal Studies, University of London) on 27 July 2014. The researcher is grateful for their feedback.

² HM Revenue and Customs "Self Assessment tax returns" (25 October 2016) <<https://www.gov.uk/self-assessment-tax-returns/overview>> (last accessed 7 November 2016). It should be noted that, by 2020 HMRC plan to have fully replaced annual tax returns with personalised digital tax accounts enabling taxpayers to register, file, pay and update their information online at any time. For further information, see HM Revenue and Customs *Making tax digital* (December 2015).

³ HM Revenue and Customs *General information about compliance checks* (CC/FS1a, November 2015) at 1.

⁴ In the course of an enquiry, under s 28ZA of the Taxes Management Act 1970 (UK), it is possible for the taxpayer and HMRC to jointly apply to the tribunal for a binding determination of "any question arising in connection with the subject matter of an enquiry." However, once a joint application on a specific matter has been made to the tribunal, the enquiry cannot be closed until the matter referred on the application has been decided.

⁵ A contract settlement is a legally binding agreement, where the taxpayer offers to pay everything that is due as a result of the compliance check, and HMRC agree not to use their formal powers to recover that amount. Taxpayers can only pay through a contract settlement if both the taxpayer and HMRC agree to this, and to the terms of the contract. There are no grounds for appeal against the tax, penalty and interest liabilities. Contract settlements cannot be entered into for any Value Added Tax (VAT) or VAT penalties that are due: HM Revenue and Customs, above n 3, at 3.

⁶ At 3.

and their reasons). In direct tax, this is known as an “appeal to HMRC.”⁷ This may lead to further discussions between the taxpayer and HMRC officials - usually the HMRC officer who is responsible for the decision - with the aim of resolving the dispute. HMRC state that most disputes are resolved in this way.⁸

If discussions between the taxpayer and HMRC do not resolve the matter or if discussions are not appropriate or possible, HMRC may offer a review. The taxpayer has 30 days from the date of the review offer to either accept it or send the appeal to an independent tax tribunal.⁹ If the taxpayer takes no action within 30 days, the dispute is treated as settled by agreement.

In a HMRC review, HMRC will appoint an officer, who has not previously been involved with the HMRC decision that the taxpayer disagrees with, to carry out a review of the decision.¹⁰ The review will usually be completed within 45 days. When the review has been completed the review officer will write to the taxpayer informing them of their decision in a review letter (that is, the original HMRC decision may be upheld, varied or cancelled). If the taxpayer disagrees with the review decision then they can still appeal to the tribunal within 30 days of the review letter.

In addition, at any time after the taxpayer has sent their appeal to HMRC, they may either request a review by HMRC (if they have not already been offered one) or notify the appeal to the tribunal. However, once the taxpayer has accepted a review offer (or asked for a review), they may only notify the appeal to the tribunal after either they have been advised by way of a review letter of the outcome by HMRC or the 45 day (or other agreed) review period has expired.¹¹

The process for disputing an indirect tax decision of HMRC is similar to the process for direct tax decisions. However, when HMRC notify the taxpayer of an indirect tax decision that may be appealed against, HMRC will offer a review at the same time. If the taxpayer wishes to dispute the indirect tax decision, they can either accept HMRC’s offer of a review or appeal directly to the tribunal within 30 days of the HMRC decision letter. If the taxpayer accepts HMRC’s review offer they can still appeal to the tribunal if they disagree with the outcome of the review.¹²

⁷ HM Revenue and Customs *HM Revenue and Customs (HMRC) decisions – what you can do if you disagree* (HMRC1, February 2016) at 1.

⁸ At 1.

⁹ CCH *British Master Tax Guide 2014-15* (Wolters Kluwer, Kingston upon Thames, 2014) at [¶12621].

¹⁰ HM Revenue and Customs, above n 7, at 1.

¹¹ At 1.

¹² At 1.

When the tribunal receives a notice of appeal, in line with r 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), it will allocate the case to one of the following categories depending on the nature and complexity of the appeal:¹³

- Default Paper cases, which are usually disposed of without a hearing;
- Basic cases, which will usually be disposed of after an informal hearing and with minimal exchange of documents before the hearing;
- Standard cases, which will usually be subject to more detailed case management and be disposed of after a hearing; and
- Complex cases, which the tribunal considers will: (a) require lengthy or complex evidence or a lengthy hearing; (b) involve a complex or important principle or issue; or (c) involve a large financial sum.

The tribunal is independent of HMRC and independently appointed expert tax judges and/or panel members hear the cases allocated. The tribunal is administered by the HM Courts and Tribunals Service (the Tribunals Service) which is part of the UK Ministry of Justice. Generally, all appeal hearings are held in public. There is no fee charged to the taxpayer for filing an appeal with the tribunal.¹⁴ It is intended that the tribunal system is accessible¹⁵ (hence there is a network of hearing centres across the UK).

The vast majority of tax appeals are first heard by the First-tier Tribunal. However, the Upper Tribunal may, in cases falling within the Complex category and with the agreement of the parties and the consent of the Presidents of the First-tier Tribunal and Upper Tribunal, hear cases in the first instance, without the case being heard by the First-tier Tribunal.¹⁶ Decisions of the First-tier Tribunal may be appealed by the taxpayer or HMRC to the Upper Tribunal on a point of law if the First-tier Tribunal or Upper Tribunal gives permission (or leave, in

¹³ The notice of appeal form does not allow the appellant to indicate as to which category they think their appeal should be allocated. However, r 23(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK) provides that: “The Tribunal may give a further direction re-allocating a case to a different category at any time, either on the application of a party or on its own initiative.”

¹⁴ In November 2016 the UK Ministry of Justice announced plans to trial a new digital service which will allow taxpayers to submit an appeal to an independent tax tribunal online rather than using the current paper-based form. However, fees will be imposed, based on the amount of tax or penalty in dispute, to cover administration costs. The online process will be available for all types of tax disputes with HMRC. However, the paper-based system will remain available for those without internet access or those who prefer to submit an application on paper: Sara White “Ministry of Justice trials online alternative to tax tribunal applications” (7 November 2016) CCH Daily <<https://www.cchdaily.co.uk/ministry-justice-trials-online-alternative-tax-tribunal-applications>> (last accessed 20 November 2016).

¹⁵ Tribunals, Courts and Enforcement Act 2007 (UK), s 22(4).

¹⁶ Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), rr 23(5)(b) and 28(1). This route may be chosen where a case is likely to be litigated to the Court of Appeal (and beyond).

Northern Ireland). Decisions of the Upper Tribunal can be appealed on to the Court of Appeal¹⁷ (or Court of Session in Scotland), and ultimately the Supreme Court.

1.3.2 HM Revenue and Customs alternative dispute resolution

HMRC introduced the application of Alternative Dispute Resolution (ADR) procedures in the resolution of certain tax disputes following an internal review of tax disputes and their outcomes conducted in 2009. HMRC established a Dispute Resolution Unit (DRU (UK)) in 2010 to oversee the development of HMRC's Litigation and Settlement Strategy (LSS) (see section 1.3.4.1 below) and to develop the use of ADR.¹⁸ Over a two-year period commencing in July 2011, HMRC conducted two ADR pilots in order to test the effectiveness of ADR techniques for resolving tax disputes in large or complex cases and in tax disputes arising in the Small and Medium-Sized Enterprises and individuals (SMEi) population. The aims of the pilots were to test whether ADR could be utilised in:¹⁹

- Improving the customer experience;
- Increasing HMRC's reputation for greater professionalism;
- Reducing costs for both parties, customer and HMRC, when disputes occur;
- Reducing the number of cases that reach statutory review and/or Tribunal.

The ADR processes used in the pilots were either facilitated discussions (facilitation) or mediation. The ADR pilot for large or complex cases utilised HMRC members of staff who had been externally accredited by the Centre for Effective Dispute Resolution (CEDR)²⁰ to facilitate discussion and/or the involvement of third-party accredited mediators. The SMEi ADR pilot utilised in-house HMRC-trained facilitators to facilitate discussions. This pilot had no access to third-party mediators. In both pilots it was found that "HMRC facilitators have proven to be objective and even handed for all types of customer."²¹

¹⁷ Appeals from the Upper Tribunal to the Court of Appeal require permission to appeal, and are only on points of law. If the Upper Tribunal refuses this leave to appeal, then approval may be sought from the Court of Appeal: CCH, above n 9, at [¶12610].

¹⁸ In January 2016 the DRU (UK) merged with other areas in HMRC to become Tax Assurance and Resolution Policy (TARP), adopting broader governance roles responsible to HMRC's Tax Assurance Commissioner. Responsibility for all operational ADR now lies in HMRC operational teams.

¹⁹ HM Revenue and Customs *Alternative Dispute Resolution for SMEs and Individuals: Project Evaluation Summary* (April 2013) at 3.

²⁰ CEDR is a London-based mediation and ADR body. It was founded as a non-profit organisation in 1990, with the support of the Confederation of British Industry and a number of British businesses and law firms, to encourage the development and use of ADR and mediation in commercial disputes: Centre for Effective Dispute Resolution "About us" <http://www.cedr.com/about_us/> (last accessed 7 November 2016).

²¹ HM Revenue and Customs *Alternative Dispute Resolution in Large or Complex Cases: Pilot Evaluation Summary* (September 2013) at 8; HM Revenue and Customs, above n 18, at 8.

Subsequent to the completion of the ADR pilots, in 2013 HMRC launched permanent ADR programs for large or complex cases (see section 1.3.2.1) and SMEi taxpayers (see section 1.3.2.2), respectively. The use of ADR where appropriate, by HMRC, is consistent with the UK Government-wide Dispute Resolution Commitment. Launched in May 2011 by the UK Ministry of Justice and Attorney General, the Dispute Resolution Commitment expects government departments and agencies to be proactive in the management of disputes, and to use effective, proportionate and appropriate forms of dispute resolution to avoid expensive legal costs or court actions.²²

1.3.2.1 Alternative dispute resolution for large or complex cases

Following a two-phase ADR pilot for large or complex cases, HMRC announced on 9 September 2013 that ADR would continue to be made available to resolve tax disputes for large or complex cases. ADR for large or complex cases can be considered either before or after the issuance of a formal decision by HMRC. However, the stage at which a particular dispute may be suitable for ADR can vary from case to case. The ADR process for large or complex cases is available alongside taxpayers' rights for a review by HMRC or to appeal to an independent tax tribunal. Entering into the ADR process also does not affect taxpayers' review or appeal rights if a dispute remains unresolved following ADR. The overall aim of ADR for large or complex cases is to "either resolve the issue(s) outright by achieving a mutually acceptable outcome or by bringing clarity to the factual landscape or arguments to make litigation more efficient."²³

ADR for large or complex cases may involve the use of the following processes:²⁴

- (i) **Facilitated discussion:** a process in which an HMRC externally trained and accredited mediator facilitates bringing the parties together but offers no opinion on the merits of the arguments being advanced. Sometimes the process involves a trained mediator also being provided by the taxpayer to jointly facilitate with the HMRC mediator (joint facilitation). The facilitator(s) may challenge each side as to how their dispute may play out in front of the Tribunal. The HMRC facilitator may or may not be a specialist in the subject matter of the dispute but will not have had any prior involvement in working on the case as part of the case team. If the taxpayer also provides a facilitator, it is expected that they similarly will have not previously worked on the case.

²² Ministry of Justice (UK) *The Dispute Resolution Commitment* (May 2011) at 1. The Dispute Resolution Commitment updated and replaced the UK Government's ADR Pledge, originally launched in 2001.

²³ HM Revenue and Customs *Alternative Dispute Resolution in Large or Complex Cases: Pilot Evaluation Summary*, above n 20, at 3.

²⁴ HM Revenue and Customs *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in Large or Complex Cases* (April 2012) at 5.

- (ii) **Facilitative mediation:** a process in which an independent external mediator is jointly engaged by HMRC and the taxpayer to try to bring the parties together but offers no opinion on the merits of the arguments being advanced. The mediator may challenge each side as to how their dispute may play out in front of the Tribunal. A facilitative mediator may or may not be a specialist in the subject matter of the dispute but will have no connection with either party.
- (iii) **Evaluative mediation:** a process in which the independent external mediator will try to bring the parties together in exactly the same way as in facilitative mediation, but also providing their view of the matter as a specialist in the subject matter of the dispute.

The former DRU (UK) has published practical guidance for HMRC staff on the use of ADR in large or complex cases.²⁵ Either the taxpayer or HMRC may suggest ADR to resolve a dispute. If a taxpayer wishes to propose ADR, they must contact their Customer Relationship Manager (CRM) or case-owner in the first instance to discuss ADR. Where a case is not considered appropriate for ADR, it is generally referred to a HMRC governance panel for consideration.²⁶ There is no charge for utilising a HMRC facilitator. However, where the parties jointly engage an independent external mediator to mediate the dispute, it is generally expected that both parties will bear the costs of the mediator equally.²⁷ ADR for large or complex cases is available for disputes arising in all tax types, including: corporation tax, income tax, capital gains tax (CGT), VAT, pay as you earn (PAYE), customs duty, construction industry scheme and penalties.

1.3.2.2 Alternative dispute resolution for small and medium-sized enterprises and individual taxpayers

The ADR service for SMEi taxpayers became part of “business as usual” for HMRC on 2 September 2013.²⁸ The SMEi ADR service uses independent facilitators from HMRC to resolve disputes between HMRC and taxpayers whether or not an appealable decision or assessment has been made by HMRC. The ADR service is available alongside taxpayers’ rights for a review by HMRC or to appeal to an independent tax tribunal. Entering into the ADR process does not affect the taxpayer’s review or appeal rights if the dispute remains unresolved following ADR.

²⁵ See HM Revenue and Customs, above n 23.

²⁶ HM Revenue and Customs *How we Resolve Tax Disputes: The Tax Assurance Commissioner’s Annual Report 2015-16* (July 2016) at 6.

²⁷ At 35.

²⁸ Peter Nias “Mediating tax disputes: All in a day’s work?” (2014) 1241 Tax J 17 at 17.

The facilitator is an HMRC member of staff who has received in-house training by HMRC in ADR techniques and who has had no prior involvement in the dispute.²⁹ The role of the facilitator is to “work with both the customer and the HMRC case-owner to try to broker an agreement between them” through meetings and telephone conversations.³⁰ The facilitator will “help all parties to obtain a shared and full understanding of the disputed facts and arguments.”³¹ In addition, the facilitator will ensure that there is proper communication between the parties and may help to explain what one or other side is trying to say to the other. However, the facilitator will not impose their views on either party.

Taxpayers are not charged a fee for using the SMEi ADR service. For cases to be considered for the SMEi ADR service taxpayers must complete an online application form and HMRC will notify the taxpayer if their request for ADR has been accepted within 30 days. If the dispute is suitable for ADR, taxpayers must sign a Memorandum of Understanding which sets out the processes and confirms their agreement to take part. The SMEi ADR service is generally available for VAT and direct tax disputes.

1.3.3 Alternative dispute resolution during the litigation stage

ADR is specifically referred to in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK). These rules provide that the First-tier Tribunal should, where appropriate, make the parties aware of the availability of any ADR procedures that may be appropriate for the resolution of the dispute and facilitate its use as necessary.³² While the Tribunals Service itself does not provide ADR programs, HMRC’s ADR programs may be utilised at any stage of a dispute, including once an appeal has been lodged with the Tribunals Service. Thus, the above provisions are designed to encourage parties to consider ADR (that is, through HMRC’s ADR programs) before any tribunal hearing takes place.³³ The Civil Procedure Rules 1998 (Practice Direction – Pre-Action Conduct) (UK) also encourages parties to consider whether some form of ADR procedure might enable them to settle a matter without starting formal court

²⁹ The taxpayer or their agent may make representations for a SMEi case to be considered for movement to the large or complex ADR process if they feel strongly that they would like to engage a third-party mediator. Acceptance is not guaranteed and there must be approval by both the SMEi governance panel and the Large and Complex ADR governance panel: HM Revenue and Customs, above n 23, at 4.

³⁰ HM Revenue and Customs “Tax disputes: Alternative Dispute Resolution (ADR)” (8 December 2014) <<https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr>> (last accessed 7 November 2016).

³¹ HM Revenue and Customs, above n 29.

³² Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), r 3(1).

³³ Email from [redacted] (Senior Policy Advisor, [redacted], HM Revenue and Customs) to Melinda Jone regarding HMRC ADR (23 July 2014).

proceedings.³⁴ The court may further require evidence that the parties considered some form of ADR.³⁵

1.3.4 HM Revenue and Customs' approach to resolving tax disputes

HMRC's LSS sets out the principles within which HMRC handles all tax disputes subject to civil law procedures.³⁶ HMRC's *Code of governance for resolving tax disputes* (Code of Governance) outlines HMRC's governance and assurance frameworks for decisions in tax disputes.³⁷ These HMRC publications are discussed below in sections 1.3.4.1 and 1.3.4.2, respectively.

1.3.4.1 HM Revenue and Customs' Litigation and Settlement Strategy

HMRC's LSS was first published in 2007 and "refreshed" in 2011 and 2013. The current (2013 refreshed) version of the LSS was updated in the light of developments in the UK Courts and Tribunals, to align the language of the LSS more closely with HMRC's then "Vision, Purpose and Way"³⁸ and "Customer-centric Business Strategy", and to reflect changes in the way HMRC is organised as well as HMRC's experience in effective and efficient tax dispute resolution, including opportunities for use of ADR.³⁹

The LSS sets out the basis on which HMRC will reach agreement in a tax dispute (subject to the over-riding authorities of the Commissioners of HMRC as defined in legislation)⁴⁰ and emphasises the benefits of a collaborative approach in achieving a resolution. The LSS states that HMRC will resolve tax disputes through civil procedures in a manner that is consistent with:⁴¹

³⁴ Civil Procedure Rules 1998 (Practice Direction – Pre-Action Conduct) (UK), para 8.1.

³⁵ Civil Procedure Rules 1998 (Practice Direction – Pre-Action Conduct) (UK), paras 4.4(3) and 8.1.

³⁶ HMRC's LSS is contained in HM Revenue and Customs *Resolving tax disputes: Commentary of the litigation and settlement strategy* (November 2013) at Annex 1.

³⁷ See HM Revenue and Customs *Code of governance for resolving tax disputes* (July 2014).

³⁸ HMRC's Vision, Purpose and Way was replaced by a new Mission Statement and revised Strategic Objectives at the beginning of 2016. See HM Revenue and Customs "About us" <<https://www.gov.uk/government/organisations/hm-revenue-customs/about>> (last accessed 7 November 2016).

³⁹ HM Revenue and Customs, above n 35, at 9.

⁴⁰ The collection and management responsibilities of the Commissioners of HMRC as set out in s 5 of the Commissioners for Revenue and Customs Act 2005 (UK) confer discretion on the HMRC Commissioners on whether to litigate to resolve a tax dispute that arises with a taxpayer or whether to settle.

⁴¹ HM Revenue and Customs, above n 35, at Annex 1, [1].

- (a) the law, whether by agreement with the customer or through litigation; and
- (b) HMRC's objectives of efficiently determining and collecting the correct tax to maximise revenue flows, while reducing costs and improving the customer experience.

In addition, the two key elements of HMRC's approach to tax disputes are:⁴²

- (a) supporting customers to get their tax right first time, so preventing a dispute arising in the first place; and
- (b) resolving those disputes which do arise in a way which establishes the right tax due at the least cost to HMRC and to its customers, which in most cases will involve working collaboratively.

A "collaborative working" approach requires both HMRC and the customer (and any agent) to work together on a cooperative, non-adversarial basis in order to resolve a dispute.⁴³ HMRC's *Commentary on the litigation and settlement strategy* provides examples of a collaborative working approach between HMRC and its customers as including the following:⁴⁴

- Early discussion of a particular risk which is under enquiry in order to understand fully the relevant facts and the law which might apply to those facts;
- Jointly agreeing a timetable with key milestones and target dates for: establishing facts; providing information or documentation; reviewing documentation; reaching decisions; and testing conclusions;
- Providing regular updates on progress towards key milestones;
- Establishing a decision tree (that is, agreeing the key questions which need to be answered in order to resolve a dispute); and
- Where a dispute has reached an apparent impasse, it may still be possible for the parties to work collaboratively in order to try to unlock the process (for example, by jointly agreeing to appoint a third party mediator).

With respect to ADR in the context of the LSS, as noted above, the LSS envisages that in the vast majority of cases disputes will be resolved "collaboratively (as opposed to adversarially) wherever possible, as the most effective and efficient means (for both sides of the dispute) to arrive at the 'right' result in a tax dispute."⁴⁵ HMRC state that "ADR also presupposes such a collaborative approach, therefore Collaborative Dispute Resolution (CDR) should be the norm

⁴² At 6.

⁴³ At 18.

⁴⁴ At 17.

⁴⁵ HM Revenue and Customs, above n 23, at 6.

and ADR a toolkit to be used sparingly within this normal way of working.”⁴⁶ Hence, “the idea behind ADR is to provide an additional mechanism when the collaborative approach to dispute resolution has lost momentum.”⁴⁷ Nevertheless, as the LSS applies to the resolution of all disputes through civil procedures, “any agreement to resolve a dispute between HMRC and a customer – whether it is facilitated by the use of ADR or not – must accord with the terms of the LSS.”⁴⁸

1.3.4.2 HM Revenue and Customs’ Code of governance for resolving tax disputes

HMRC’s Code of Governance⁴⁹ sets out HMRC’s internal governance arrangements for decisions on how tax disputes should be resolved. The “arrangements described in the code provide assurance that the principles of the LSS are applied consistently in practice to the resolution of tax disputes.”⁵⁰ The Code of Governance also outlines the role of HMRC’s Tax Assurance Commissioner. The Tax Assurance Commissioner’s role, which was created in July 2012, is to ensure that the UK Parliament and the public can have confidence in HMRC’s work, “with an explicit challenge role to assess whether a proposed settlement secures the right tax efficiently and in so doing treats taxpayers even-handedly.”⁵¹ The Tax Assurance Commissioner has particular oversight of the settlement of large tax disputes, but does not engage with specific taxpayers on their liabilities, nor manage HMRC case-workers.

The Code of Governance outlines the decision-making process for resolving tax disputes according to the characteristics of the case to ensure that individual disputes are worked effectively with sufficient oversight and assurance. The most significant tax dispute cases must be decided by a panel of three HMRC Commissioners (including the Tax Assurance Commissioner), with the case first having been considered by the Tax Disputes Resolution Board (TDRB). The TDRB considers proposals to settle tax disputes in cases where the total tax under consideration across all issues is more than £100 million or cases which are particularly sensitive, where the decision could have a significant impact on HMRC policy, strategy or operations (and may also be likely to prompt significant national publicity).⁵² Certain decisions about significant and sensitive risks which do not fall within the remit of the TDRB are referred to case boards which sit within HMRC’s business areas. These case boards

⁴⁶ At 6.

⁴⁷ Shelley Griffiths “No discretion should be unconstrained: Considering the ‘care and management’ of taxes and the settlement of tax disputes in New Zealand and the UK” (2012) BTR 167 at 172.

⁴⁸ HM Revenue and Customs, above n 35, at 30.

⁴⁹ HM Revenue and Customs, above n 36.

⁵⁰ At 4.

⁵¹ HM Revenue and Customs *How we Resolve Tax Disputes: The Tax Assurance Commissioner’s Annual Report 2012-13* (July 2013) at 5.

⁵² HM Revenue and Customs, above n 36, at 5.

include the Specialist Personal Tax (SPT), Enforcement and Compliance (E&C) and Large Business (LB) Dispute Resolution Boards.⁵³

⁵³ The remits for the TDRB and the business-level case boards are provided in HM Revenue and Customs, above n 36, at Annex C and Annex D, respectively.

Appendix 1.4: The United States' Tax Dispute Resolution Procedures

1.4.1 The United States tax dispute resolution procedures: Overview¹

Under the current self-assessment system in the United States (US), most taxpayers report their items of income, deductions and credits to the government and voluntarily assess their tax due through the filing of an annual tax return. The US federal tax laws are provided for in the Internal Revenue Code of 1986 (I.R.C.)² and are primarily administered by the Internal Revenue Service (IRS).³ Disputes between a taxpayer and IRS the generally arise through the IRS's audit (examination) process. Tax disputes can also result from collection actions proposed or taken by the IRS.⁴

A taxpayer's return may be selected for examination because their return has been red-flagged by the IRS because of a possible problem or inaccuracy, or in rare instances the examination may be the result of random selection. During the course of an IRS examination, the IRS will typically issue one or more Notice of Proposed Adjustments (NOPAs (US)) identifying the proposed issues, applying applicable law to the facts, and stating the official IRS position or determination. The taxpayer is provided with the opportunity to make a written response to the NOPA (US).⁵ In addition, at the end of the examination, the taxpayer may also request a meeting with the IRS examiner and/or the examiner's supervisor to discuss the proposed adjustments.⁶ If the taxpayer cannot reach an agreement with the examiner and/or the examiner's supervisor at this meeting, the examiner will prepare a report explaining both the

¹ The material in Appendix 1.4 was reviewed and subsequently discussed with the researcher by Stewart Karlinsky (Professor Emeritus, San Jose State University) on 12 March 2014 and 26 March 2014, respectively. The researcher is grateful for his feedback.

² Codified at Title 26 of the United States Code (26 U.S.C.).

³ The IRS is organised into four operating divisions serving groups of taxpayers with similar needs. These operating divisions are: (1) Wage and Investment (W&I); (2) Small Business/ Self-Employed (SB/SE)); (3) Large Business and International (LB&I) (formerly, Large and Mid-Size Businesses (LMSB)); and (4) Tax-Exempt and Government Entities (TE/GE): CCH *US Master Tax Guide 2015* (98th ed, CCH, Chicago, 2014) at [¶2701].

⁴ As stated in chapter 5, section 5.3.1 of this thesis, the dispute resolution processes for disputes arising from IRS examination and IRS collection differ. The description and DSD evaluation of the US tax dispute resolution system in this study generally focus on disputes arising from IRS examinations given that, as outlined in chapter 2, section 2.2.1 of this thesis, this study focuses on tax disputes concerning taxpayers' tax liabilities or entitlements rather than disputes over collection efforts of the revenue authority. For further information on the dispute resolution process for collection cases, see Internal Revenue Service *The IRS Collection Process* (Pub. No. 594, January 2015) and Internal Revenue Service *Collection Appeal Rights* (Pub. No. 1660, February 2014).

⁵ The taxpayer's written response to the NOPA (US) must be made prior to the Revenue Agent's Report, issued at the end of the IRS examination.

⁶ Following an IRS examination, in certain circumstances, taxpayers may choose to enter into a full agreement on all issues proposed for adjustment (or a partial agreement on one or more issues proposed for adjustment). The taxpayer is then generally unable to exercise appeal rights with the IRS for these issues or contest them in the US Tax Court. See, for example, Internal Revenue Service *Income Tax Examination Changes* (Form 4549, May 2008).

taxpayer's and IRS's positions. Within a few weeks after the meeting, the taxpayer will receive:⁷

- A letter (also known as a 30-day letter) notifying the taxpayer of their rights to appeal the proposed changes within 30 days;
- A copy of the examiner's report explaining the proposed changes (also known as a Revenue Agent's Report);
- An agreement or a waiver form; and
- A copy of Publication 5 *Your Appeal Rights and How to Prepare a Protest if You Don't Agree*.⁸

The taxpayer generally has 30 days from the date of the 30-day letter to tell the IRS whether they will accept the proposed adjustments or appeal them to the IRS Appeals Office. Founded in 1927, the IRS Appeals Office is organisationally located in the Office of the Commissioner of the IRS. It is independent of any other IRS office (including the IRS Examination division and the Office of the Chief Counsel) and serves as an administrative forum for any taxpayer who disagrees with an IRS determination.⁹ When the IRS Appeals Office receives the taxpayer's appeal, an IRS Appeals officer will review the issues of the taxpayer's case with "a fresh, objective perspective" and schedule a conference with the taxpayer so that the IRS Appeals officer and the taxpayer can attempt to negotiate a mutually acceptable settlement.¹⁰ IRS Appeals conferences are informal and are conducted by correspondence, telephone or in-person.¹¹ The IRS state that most differences are settled at this level.¹²

Unlike the IRS Examination division, IRS Appeals operates under a delegation of authority that allows it to settle cases based on "hazards of litigation." This authority means that, instead of resolving a case based on facts or a clear-cut interpretation of law, IRS Appeals Officers can assess what would happen if the case were to go to trial, assign a percentage possibility of success or failure in litigation, and then use that information to determine whether and how to settle a case.¹³

⁷ Internal Revenue Service *Examination of Returns, Appeal Rights and Claims for Refund* (IRS Pub. No. 556, September 2013) at 5.

⁸ See Internal Revenue Service *Your Appeal Rights and How To Prepare a Protest If You Don't Agree* (IRS Pub. No. 5, January 1999).

⁹ Internal Revenue Service *Appeals* (IRS Pub. No. 4227, October 2013) at 2.

¹⁰ At 2.

¹¹ Effective from 1 October 2016, IRS policy in the I.R.M. was revised to reflect that most conferences in IRS Appeals are conducted by telephone and to make that the default method. The revision also provides guidance for when in-person conferences may be appropriate. See I.R.M. 8.6.1.4.1.

¹² Internal Revenue Service, above n 8, at 8.

¹³ Treas. Reg. § 601.106(f)(2).

In order to preserve the independence of IRS Appeals officers, the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998)¹⁴ requires the IRS to implement measures to generally prohibit ex parte communication between the Appeals officer and other IRS officers “to the extent that such communications appear to compromise the independence of the appeals officers.”¹⁵ IRS procedure, therefore, prohibits certain communications between IRS Appeals officers and officers from originating functions, such as the examination or compliance function, unless the IRS Appeals officer provides an opportunity for the taxpayer to participate in the communication. If the taxpayer chooses not to participate, the communication between the IRS Appeals officer and the other IRS officer is no longer prohibited.¹⁶

To appeal an IRS tax decision (and thus, request an Appeals conference) the taxpayer must file either a formal written protest or a small case request. Taxpayers must file a formal protest:¹⁷

- If the total amount of tax, penalties, and interest for any tax period is more than \$US25,000;
- In all partnership and S corporation cases, regardless of the dollar amount;
- In all employee plan and exempt organisation cases, regardless of the dollar amount;
- In all other cases, unless the taxpayer qualifies for other special appeal procedures, such as requesting appeals consideration of liens, levies, seizures, or installment agreements.

If the total amount of tax, penalties, and interest for each tax period involved is \$US25,000 or less, and the taxpayer does not meet any of the other criteria for filing a formal protest outlined above, the taxpayer may make a small case request instead by sending a letter requesting IRS Appeals consideration, indicating the changes the taxpayer does not agree with and the reasons why they do not agree.

If the taxpayer does not respond to the 30-day letter (that is, the taxpayer chooses to bypass the IRS’s Appeals system),¹⁸ or if they respond but do not reach an agreement with an IRS Appeals officer, the IRS will send the taxpayer a 90-day letter, also known as a Notice of Deficiency.¹⁹

¹⁴ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998).

¹⁵ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a)(4), 112 Stat. 685, 689 (1998).

¹⁶ IRM 8.1.10.4.1.

¹⁷ Internal Revenue Service, above n 8, at 1.

¹⁸ In most instances, a case petitioned to the US Tax Court will normally be considered for settlement by an IRS Appeals Office before the US Tax Court hears the case: Internal Revenue Service, above n 7, at 9.

¹⁹ I.R.C. § 6212(a).

The Notice of Deficiency notifies the taxpayer of the IRS's intent to assess a tax deficiency and informs them of their right to file a petition to dispute the proposed adjustments. The taxpayer has 90 days (150 days if it is addressed to a taxpayer outside the US) from the date of the notice to file a petition with the US Tax Court,²⁰ the US District Court or the US Court of Federal Claims.²¹ A case may be further appealed to the US Court of Appeals²² (or the US Court of Appeals for the Federal Circuit for decisions of the US Court of Federal Claims) and ultimately to the US Supreme Court, if these courts accept the case.

1.4.2 Internal Revenue Service alternative dispute resolution programs

In 1990 Congress passed the Administrative Dispute Resolution Act (ADRA 1990)²³ which mandated that all federal government agencies begin to implement alternative dispute resolution (ADR) procedures into their administrative dispute processes in order to reduce the time and cost associated with resolving disputes. In 1998, the RRA 1998 enacted I.R.C. § 7123. This section directed the IRS to implement procedures to allow a broader use of early appeals programs and to establish procedures that allow for ADR processes such as mediation and arbitration. Pursuant to these mandates, the IRS created five main post-filing ADR programs designed to resolve cases much earlier than the normal IRS Appeals process: (1) Fast Track Settlement (FTS); (2) Fast Track Mediation (FTM) (replaced as from 18 November 2016);²⁴ (3) Early Referral (ER); (4) Post Appeals Mediation (PAM); and (5) Arbitration (eliminated as from 21 September 2015). In addition, in 2012 the IRS developed a new post-filing ADR program called the Rapid Appeals Process (RAP). All of the IRS's ADR programs are optional and consensual (that is, both parties must agree to participate). The current main post-filing

²⁰ If the amount in the taxpayer's case is \$US50,000 or less for any one tax year or period, the taxpayer can request that the case be handled under the small tax case procedure in the US Tax Court. If the US Tax Court approves, the taxpayer can present their case to the US Tax Court for a decision that is final and that they cannot appeal: Internal Revenue Service, above n 7, at 12.

²¹ The US Tax Court is the main court for trying disputes between taxpayers and the IRS. It reviews deficiencies asserted by the IRS for: income tax; estate tax, gift tax; or certain excise taxes of private foundations, public charities, qualified pension and other retirement plans, or real estate investment trusts. The US Tax Court generally hears cases before any tax has been assessed and paid. The US District Court and the US Court of Federal Claims generally hear tax cases only after the taxpayer has paid the tax and filed a claim for a credit or refund: at 12.

²² Except for cases tried under the small case procedure of the US Tax Court.

²³ The Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (1990) was re-enacted as the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

²⁴ FTM was replaced by Fast Track Mediation – Collection (FTMC), a fast track mediation program specifically directed at resolving certain collection cases and issues. The former FTM was available for certain qualifying SB/SE taxpayers with either examination or collection cases. Under FTMC any type of taxpayer can participate in the program, provided the taxpayer meets the eligibility requirements set forth in the revenue procedure and the taxpayer's case is being worked on in the IRS's collection function. Section 1.4.2.2 of this appendix outlines the currently available FTMC (and not the former FTM). While not applicable to disputes arising from an IRS examination, an outline of FTMC has been included for the purposes of completeness. It has also been included due to its recent replacement of its predecessor program (which was then relevant to both examination and collection disputes). For further information on the former FTM, see Internal Revenue Service Rev. Proc. 2003-41, 2003-25 I.R.B. 1047 ["Rev. Proc. 2003-41"].

IRS ADR programs (as well as the eliminated Arbitration program) are outlined in sections 1.4.2.1-1.4.2.6.

1.4.2.1 Fast Track Settlement

Fast Track Settlement (FTS)²⁵ is designed to help certain LB&I, SB/SE and TE/GE taxpayers expeditiously resolve disputes during an IRS examination. The FTS program is aimed at resolving issues arising during the examination process within a goal of 120 days (LB&I) or 60 days (SB/SE and TE/GE) from acceptance of the FTS application. FTS “brings Appeals resources to a mutually agreed upon location to resolve the dispute before the 30-day letter is issued.”²⁶ An IRS Appeals Official trained in mediation is assigned to act as a neutral third party in the FTS process.²⁷ The Appeals Official firstly attempts to facilitate an agreement between the parties and if that fails, they may make a recommendation regarding the settlement of any or all issues (both factual and legal). If the settlement proposal is acceptable to both parties, it may be adopted. The Appeals Official will have settlement authority and can exercise that authority to write up the settlement of FTS issues agreed to by the parties. Communications made during FTS sessions are confidential except as provided by statute.²⁸

Taxpayers may request FTS after the IRS has issued a NOPA (US) but has not issued a 30-day letter and the taxpayer has submitted a written response to the NOPA (US). FTS is generally available for factual and legal issues, and issues that require consideration of the hazards of litigation. Either the taxpayer or the relevant IRS operating division Team Manager may suggest participation in the FTS program. If both parties agree to use FTS, they may contact the FTS Program Manager to determine if FTS is appropriate.²⁹ The taxpayer may withdraw from FTS at any time by notifying the relevant IRS operating division Team Manager and the FTS Appeals Official in writing. If there are any unresolved issues after the FTS process, the taxpayer retains all of their otherwise applicable appeal rights to request consideration through the traditional IRS Appeals process (or alternatively pursue their claim in court) for these issues.

²⁵ The FTS program is formally documented in Internal Revenue Service Rev. Proc. 2003-40, 2003-25 I.R.B. 1044 [“Rev. Proc. 2003-40”].

²⁶ Internal Revenue Service *Appeals: Introduction to Alternative Dispute Resolution* (IRS Pub. No. 4167, July 2012) at 2.

²⁷ An IRS Appeals Team Case Leader (ATCL), trained in mediation or, in limited cases, an IRS Appeals Officer, trained in mediation, in conjunction with an IRS Appeals Team Manager, serves as the neutral FTS Appeals Official. The taxpayer does not have the option of using a non-IRS employee as a mediator in the FTS program. The expense of the FTS Appeals Official is met by the IRS: Internal Revenue Service “Rev. Proc. 2003-40”, above n 25, at [5.01].

²⁸ The prohibition against ex parte communications between IRS Appeals Officers and other IRS employees provided by section 1001(a) of the RRA 1998 does not apply to the communications arising in FTS because IRS Appeals personnel, in facilitating an agreement between the taxpayer and the relevant IRS operating division, are not acting in their traditional IRS Appeals settlement role: at [5.11].

²⁹ To apply to the program, the parties must complete and execute an application for FTS. All applications require the approval of a FTS Program Manager before acceptance into FTS: at [4.02].

1.4.2.2 Fast Track Mediation – Collection

Fast Track Mediation – Collection (FTMC)³⁰ may generally be utilised by all types of taxpayers to resolve certain collection cases and issues. Cases may arise in the IRS collection process when taxpayers do not make required tax payments (including interest and penalties, where applicable) in full or on time after receiving a bill from the IRS, and collection actions are proposed or taken by the IRS. FTMC is designed to allow IRS collection personnel and taxpayers the opportunity to mediate their disputes with an IRS Appeals mediator acting as a neutral third party.³¹ The Appeals mediator assists IRS collection personnel and the taxpayer in understanding the nature of the dispute and uses mediation techniques to focus issues and lead IRS collection personnel and the taxpayer to self-determine the outcome of the dispute. The goal is to reach a mutually satisfactory resolution consistent with applicable law within an average of 30 to 40 business days from the initial joint discussion between the Appeals mediator and the parties. Unlike under FTS, the Appeals mediator does not have settlement authority and will not render a decision regarding any issue in dispute. As the Appeals mediator cannot require either party to accept a certain outcome, the issues submitted to the FTMC process may only be resolved if both the taxpayer and IRS collection personnel reach an agreement. Communications made during FTMC sessions are confidential except as provided by statute.³²

Issues dealt with under the FTMC program include both legal and factual issues. Unlike FTS, FTMC is generally not available for issues for which resolution will depend on an assessment of the hazards of litigation and which require the Appeals mediator to use delegated settlement authority. Either the taxpayer or IRS collection may suggest participation in FTMC. The program may be used only when all other collection issues are resolved but for the issue(s) for which FTMC is being requested. A request for participation in FTMC should be initiated after an issue has been fully developed and before IRS collection has made a final determination regarding the issue. To apply for the FTMC program, the parties must complete an Agreement to Mediate.³³ Either party may withdraw from the mediation process at any time by notifying the other party and the Appeals mediator in writing of the withdrawal. If there are any unresolved issues after the FTMC process, the taxpayer retains all of their otherwise applicable

³⁰ The FTMC program is formally documented in Internal Revenue Service Rev. Proc. 2016-57, 2016-49 I.R.B. 786 [“Rev. Proc. 2016-57”].

³¹ The IRS Appeals mediator is an IRS Appeals employee who has been trained in mediation. The taxpayer does not have the option of using a non-IRS employee as a mediator in the FTMC program. The expense of the IRS Appeals mediator is met by the IRS: at [5.02].

³² The prohibition against ex parte communications between IRS Appeals Officers and other IRS employees provided by section 1001(a) of the RRA 1998 does not apply to the communications arising in the FTMC program because IRS Appeals personnel, in facilitating an agreement between the taxpayer and IRS collection, are not acting in their traditional IRS Appeals settlement role: at [6.08].

³³ All applications to the FTMC program require the approval of an IRS Appeals Manager before acceptance into FTMC: at [4.05].

appeal rights to request consideration through the traditional IRS Appeals Office process (or alternatively pursue their claim in court) for these issues.

1.4.2.3 Early Referral

The Early Referral (ER)³⁴ program allows taxpayers under an IRS examination to request the transfer of a developed but unagreed issue to the IRS Appeals division while the other issues in the case continue to be developed in the IRS Examination division. Accordingly, the IRS Appeals division takes jurisdiction over all issues accepted for ER while all other issues in the case remain in the IRS Examination division's jurisdiction. ER is a process to resolve cases more expeditiously through the IRS Examination and Appeals divisions working simultaneously. The early resolution of a key issue may also encourage taxpayers and the IRS to agree on other issues in the case.³⁵

Appropriate issues for ER include issues that: if resolved, can reasonably be expected to result in quicker resolution of the entire case; both the taxpayer and the IRS Examination division agree should be referred early to IRS Appeals; are fully developed; and are part of a case where the remaining issues are not expected to be completed before IRS Appeals could resolve the ER issue. Issues with respect to which a 30-day letter has been issued are excluded from ER.

Either the taxpayer or IRS Examination may initiate ER to the IRS Appeals division. Where the taxpayer initiates the process, they must submit a written request to their case/group manager.³⁶ The regular IRS Appeals procedures, including taxpayer conferences, apply to ER issues. If an agreement is reached with IRS Appeals on an ER issue, generally a Form 906, *Closing Agreement on Final Determination Covering Specific Matters*, is prepared.³⁷ If an agreement is not reached, the taxpayer may generally request PAM (see section 1.4.2.4 below) for the issue. If PAM is not requested, IRS Appeals will return jurisdiction over the issue to the IRS Examination division. IRS Appeals will not reconsider an unagreed ER issue if the entire case is later protested to IRS Appeals unless there has been a substantial change in circumstances regarding the ER issue.

A taxpayer may withdraw an ER request after the IRS Appeals takes jurisdiction over the issues. The withdrawal request must be communicated in writing to the Appeals Officer

³⁴ The ER program is formally documented in Internal Revenue Service Rev. Proc. 99-28, 1999-29 I.R.B. 109 [“Rev. Proc. 99-28”].

³⁵ Internal Revenue Service, above n 26, at 2.

³⁶ If the case/group manager does not approve the ER request with respect to any issue, the taxpayer retains the right to pursue the administrative appeal of any proposed deficiency related to that issue at a later time: Internal Revenue Service “Rev. Proc. 99-28”, above n 34, at [2.10].

³⁷ Internal Revenue Service *Closing Agreement on Final Determination Covering Specific Matters* (Form 906, August 1994).

assigned the ER. The withdrawal from ER is treated the same as if no agreement was reached on the ER issues.

1.4.2.4 Post Appeals Mediation

Post Appeals Mediation (PAM)³⁸ is available for certain cases that are already in the IRS Appeals process. The program is available only after IRS Appeals settlement discussions are unsuccessful and, generally, when all other issues are resolved but for the issue(s) for which mediation is being requested. PAM is a non-binding process that uses the services of a mediator, as a neutral third party, to help IRS Appeals and the taxpayer reach their own negotiated settlement. PAM utilises an IRS Appeals employee who is a trained mediator and is independent of the IRS Appeals officer that the taxpayer has been dealing with.³⁹ IRS Appeals pay the expenses associated with the IRS Appeals mediator. In addition to the IRS Appeals mediator, the taxpayer may elect to use a non-IRS co-mediator.⁴⁰ The taxpayer is required to pay the expenses associated with a non-IRS co-mediator.

The mediator's role is to act as a facilitator, assisting in defining the issues and promoting settlement negotiations between IRS Appeals and the taxpayer. The mediator does not have settlement authority in the mediation process and will not render a decision regarding any issue in dispute. The PAM process is confidential except as provided by statute.⁴¹

A taxpayer or IRS Appeals may request PAM after consulting with each other. Taxpayers may request PAM if they are already in the IRS Appeals process with any qualifying issues and their case is not docketed in any court. To request PAM, the taxpayer must send a written request to the appropriate IRS Appeals Team Manager.⁴² Upon approval of the request to mediate, the taxpayer and IRS Appeals must enter into a written agreement to mediate. The goal is to achieve resolution within 60-90 days from the approval of the PAM application.⁴³

If IRS Appeals and the taxpayer reach an agreement on some or all of the issues through the mediation process, IRS Appeals will use established closing procedures including, where

³⁸ The PAM program is formally documented in Internal Revenue Service Rev. Proc. 2014-63, 2014-53 I.R.B. 1014 ["Rev. Proc. 2014-63"].

³⁹ The IRS Appeals Team Manager and the taxpayer are required to select the IRS Appeals mediator from a list of trained employees who, generally, will be from the same IRS Appeals office or geographic area where the case is assigned, but will not be a member of the same team that was assigned to the case: at [9.01].

⁴⁰ If an election is made to use a non-IRS co-mediator, the taxpayer and the IRS Appeals Team Manager are required to select the mediator from any local or national organisation that provides a roster of mediators: at [9.01].

⁴¹ To ensure that one party is not in a position to exert undue influence on the mediator, ex parte contacts with the mediator outside the mediation session are prohibited: at [10.03].

⁴² The acceptance of a request for PAM requires the approval of an IRS Appeals Team Manager after they have conferred with the IRS Appeals Office of Tax Policy and Procedure: at [7.03].

⁴³ Internal Revenue Service "Post-Appeals Mediation" (25 January 2016) <<http://www.irs.gov/Individuals/Post-Appeals-Mediation>> (last accessed 7 November 2016).

appropriate, the preparation of a Form 906, *Closing Agreement on Final Determination Covering Specific Matters*.⁴⁴ If IRS Appeals and the taxpayer do not reach an agreement on an issue being mediated, a 90-day letter will be issued with respect to all unagreed issues (allowing the taxpayer to file a petition in the US Tax Court, the US Court of Federal Claims or the US District Court). Either party may withdraw from the process at any time before reaching a settlement of the issue(s) being mediated by notifying the other party and the mediator in writing.

1.4.2.5 Arbitration

On January 18, 2000 IRS Appeals initiated a two-year pilot program offering arbitration procedures in order to comply with requirements under section 7123(b) of the I.R.C. that such a program should be established. Rev. Proc. 2006-44, 2006-2 C.B. 800⁴⁵ formally established the Appeals arbitration program on 30 October 2006. Generally, arbitration was available for cases in which a limited number of factual issues remained unresolved following settlement discussions in the IRS Appeals division.⁴⁶ However, effective from 21 September 2015, the IRS Appeals arbitration program was eliminated due to “the general lack of demand for arbitration and the fact that its use as a tool to settle disputes without litigation has not proven successful.”⁴⁷ During the 14-year period in which arbitration was available, only two cases were settled using arbitration.⁴⁸

1.4.2.6 Rapid Appeals Process

In July 2012, the IRS announced a new Rapid Appeals Process (RAP)⁴⁹ for LB&I cases where the IRS Appeals division uses FTS techniques to convert a LB&I “pre-conference meeting” into a “working conference” involving the IRS Appeals division, the IRS Examination division and the taxpayer to resolve unagreed tax issues.⁵⁰ Thus, RAP takes place while the case is in Appeals’ jurisdiction, with IRS Appeals managing and administering the program. RAP provides LB&I and taxpayers an opportunity to resolve their disputes with an IRS Appeals officer utilising mediation skills and settlement authority.⁵¹ The IRS Appeals Officer uses mediation techniques to focus the issues and guide LB&I and the taxpayer to self-determine

⁴⁴ Internal Revenue Service, above n 37.

⁴⁵ Obsolete by Internal Revenue Service Rev. Proc. 2015-44, 2015-38 I.R.B. 354 [“Rev. Proc. 2015-44”].

⁴⁶ At [2.0].

⁴⁷ At [3.0].

⁴⁸ At [3.0].

⁴⁹ There is no IRS revenue procedure for RAP. However, the procedures for IRS Appeals employees to follow when working a RAP case are contained in IRM 8.26.11.

⁵⁰ IRM 8.26.11.1.

⁵¹ IRM 8.26.11.2.

the outcome of the dispute.⁵² If successful, RAP can resolve issues in one conference and avoids the time and cost of completing the normal Appeals process. RAP is a voluntary process and if either party objects to using RAP, IRS will utilise the traditional Appeals process. Either party may withdraw from RAP at any time. If the case (in whole or in part) is not resolved using RAP, the taxpayer is entitled to traditional Appeals consideration on all remaining unagreed issues.⁵³

1.4.3 Other Internal Revenue Service dispute resolution programs

Sections 1.4.3.1 and 1.4.3.2 respectively note selected other pre-filing and post-filing IRS dispute resolution programs.

1.4.3.1 Pre-filing

The IRS offers a number of pre-filing dispute resolution programs. These programs include, but are not limited to: the Pre-Filing Agreement (PFA) program;⁵⁴ Private Letter Ruling;⁵⁵ Industry Issue Resolution (IIR) program;⁵⁶ Advance Pricing Agreement (APA) program⁵⁷ and; the Compliance Assurance Process (CAP) program.⁵⁸ While the existence of these programs is acknowledged, as noted in chapter 2, section 2.2.1 of this thesis, an examination of pre-filing programs is beyond the scope of this study.

1.4.3.2 Post-filing

Other IRS post-filing dispute resolution initiatives include, but are not limited to: the Accelerated Issue Resolution (AIR) program;⁵⁹ Delegation Order 4-24;⁶⁰ and Delegation Order 4-25.⁶¹ However, as noted in chapter 2, section 2.2.2 of this thesis, these programs are excluded from the definition of ADR used in this study. This is primarily because these processes do not specifically involve an “impartial person assist[ing] those in a dispute to resolve the issues between them.”⁶² The exclusion of these processes from the definition of ADR is further

⁵² IRM 8.26.11.2.

⁵³ IRM 8.26.11.9.2.

⁵⁴ See Internal Revenue Service Rev. Proc. 2016-30, 2016-21 I.R.B. 981 [“Rev. Proc. 2016-30”].

⁵⁵ See Internal Revenue Service Rev. Proc. 2017-1, 2017-1 I.R.B. 1 [“Rev. Proc. 2017-1”].

⁵⁶ See Internal Revenue Service Rev. Proc. 2016-19, 2016-13 I.R.B. 497 [“Rev. Proc. 2016-19”].

⁵⁷ See Internal Revenue Service Rev. Proc. 2015-41, 2015-35 I.R.B. 263 [“Rev. Proc. 2015-41”].

⁵⁸ See Internal Revenue Service “Compliance Assurance Process” (26 August 2016) <<http://www.irs.gov/Businesses/Corporations/Compliance-Assurance-Process>> (last accessed 7 November 2016) and IRM 4.51.8.

⁵⁹ See Internal Revenue Service Rev. Proc. 94-67, 1994-2 C.B. 800 [“Rev. Proc. 94-67”].

⁶⁰ See IRM 1.2.43.22.

⁶¹ See IRM 1.2.43.23.

⁶² National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Barton, 2003)

consistent with the mandates of the ADRA 1990 and the RRA 1998 which encouraged federal agencies to use neutral third party ADR techniques.

1.4.4 Alternative dispute resolution in the United States Tax Court

Under Tax Court Rule 124, the ADR processes available in the US Tax Court include voluntary binding arbitration and voluntary non-binding mediation.⁶³ Tax Court Rule 124(a) provides that the parties may move that any factual issue in controversy be resolved through voluntary binding arbitration. The motion may be made before trial at any time after the case is at issue. Upon the filing of the motion, the Chief Judge will assign the case to a Judge or Special Trial Judge for disposition of the motion and supervision of any subsequent arbitration.⁶⁴ The parties are to agree to, *inter alia*, the identity of the arbitrator or the procedure used to select the arbitrator⁶⁵ and to the prohibition against *ex parte* communication with the arbitrator.⁶⁶ The parties must also agree to be bound by the findings of the arbitrator in respect of the issues to be resolved. Once the arbitrator renders a decision, the parties are to report promptly to the court the findings made by the arbitrator and are to attach to the report any written report or summary that the arbitrator may have prepared.⁶⁷

Tax Court Rule 124(b) provides that “parties may move by joint or unopposed motion that any issue in controversy be resolved through voluntary nonbinding mediation.”⁶⁸ Such a motion may be made at any time after a case is at issue and before the decision in the case is final. Where mediation is opted for, the parties are to jointly select a mediator. If the parties cannot agree on a mediator, they may agree to a procedure to be used to select a mediator.⁶⁹ In addition, the parties may seek the assistance of the Federal Mediation and Conciliation Service in selecting a mediator.⁷⁰ Parties may give consideration to requesting that a Judge or Special Trial Judge of the US Tax Court acts as the mediator.⁷¹ If the parties reach an agreement on all or some of the issues through the mediation process, a stipulation of settled issues or a decision

<<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACpublications.aspx>> (last accessed 7 November 2016) at 4.

⁶³ Tax Court Rule 124(c) also provides for the use of “Other Methods of Dispute Resolution” with or without involvement by the Court.

⁶⁴ Tax Court Rule 124(a).

⁶⁵ Tax Court Rule 124(a)(2)(C).

⁶⁶ Tax Court Rule 124(a)(2)(E).

⁶⁷ IRM 35.5.5.3.

⁶⁸ However, except in extraordinary circumstances, mediation is generally not available in the US Tax Court if it has already been made available to the taxpayer or tried once without success, for example, at the IRS Appeals level: IRM 35.5.5.5.

⁶⁹ IRM 35.5.5.7.

⁷⁰ IRM 35.5.5.7.

⁷¹ Tax Court Rule 124(b)(2).

document will be drafted for the parties' signature and submission to the US Tax Court. If the parties are not able to reach an agreement on an issue being mediated, the parties will prepare for trial as normal.⁷²

1.4.5 Taxpayer Bill of Rights and the Taxpayer Advocate Service

Since assuming her position in 2001, National Taxpayer Advocate (NTA) Nina Olson has emphasised the protection of taxpayer rights in tax administration. In her *2007 Annual Report to Congress*, and in later reports, she proposed a new Taxpayer Bill of Rights.⁷³ On 10 June 2014, the IRS formally adopted the NTA's proposal. The Taxpayer Bill of Rights takes the rights that exist throughout the I.R.C., the RRA 1998 and the Internal Revenue Manual (IRM) and presents them in a clear and useful way.⁷⁴ The Taxpayer Bill of Rights⁷⁵ outlines, inter alia, that taxpayers have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes. Taxpayers are also entitled to a fair and impartial administrative appeal of most IRS decisions and generally have the right to take their cases to court. In addition, the Taxpayer Bill of Rights outlines that taxpayers have the right to receive assistance from the Taxpayer Advocate Service (TAS) if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.

The TAS is an independent organisation within the IRS, headed by the NTA. Each state has at least one Local Taxpayer Advocate (LTA) who is independent of the local IRS office and reports directly to the NTA. The mission of the TAS is to help taxpayers resolve problems with the IRS and to recommend changes to prevent the problems.⁷⁶ The organisation fulfils its mission through two types of advocacy: case advocacy (assisting taxpayers in resolving problems with the IRS) and systemic advocacy (identifying areas in which groups of taxpayers are experiencing problems with the IRS and, to the extent possible, proposing administrative or legislative changes to resolve or mitigate those problems).⁷⁷

In assisting taxpayers to resolve problems with the IRS, the NTA can issue a taxpayer assistance order (TAO) if the NTA "determines the taxpayer is suffering or about to suffer a

⁷² IRM 35.5.5.6.

⁷³ See Nina E Olson *National Taxpayer Advocate 2007 Annual Report to Congress* (Internal Revenue Service, December 2007); Nina E Olson *National Taxpayer Advocate 2011 Annual Report to Congress* (Internal Revenue Service, December 2011); and Nina E Olson *National Taxpayer Advocate 2013 Annual Report to Congress* (Internal Revenue Service, December 2013).

⁷⁴ Nina E Olson *National Taxpayer Advocate 2013 Annual Report to Congress*, above 73, at 5.

⁷⁵ The Taxpayer Bill of Rights contains 10 rights and is incorporated in Internal Revenue Service *Your Rights as a Taxpayer* (IRS Pub. No. 1, December 2014) which is given to every taxpayer selected for an IRS examination.

⁷⁶ IRM 13.1.1.12.

⁷⁷ IRM 13.1.1.2.

significant hardship as a result of the manner in which the internal revenue laws are being administered” by the IRS.⁷⁸ Significant hardship means “serious privation caused or about to be caused to the taxpayer”⁷⁹ and includes (a) an immediate threat of adverse action; (b) a delay of more than 30 days in resolving taxpayer account problems; (c) the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or (d) irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.⁸⁰ A TAO can direct the IRS to take a specific action, cease a specific action or refrain from taking a specific action; or can order the IRS to expedite, review, or reconsider an action at a higher level.⁸¹

The IRS must comply with a TAO unless it is appealed and then modified or rescinded by the NTA, the Commissioner of the IRS, or the Deputy Commissioner.⁸² The NTA may not make a substantive determination of any tax liability. A TAO is not intended to be a substitute for an established administrative or judicial review procedure, but rather it is intended to supplement existing procedures if a taxpayer is about to suffer or is suffering a significant hardship. In addition, a taxpayer’s right to administrative or judicial review is not diminished or expanded in any way as a result of the taxpayer seeking assistance from TAS.

1.4.6 Taxpayer Advocacy Panel

Additionally, included under the auspices of the NTA, is the Taxpayer Advocacy Panel (TAP). The TAP is a group of about 75 citizen volunteers who listen to taxpayers, identify taxpayers’ issues, and make suggestions for improving IRS service and customer satisfaction.⁸³ The TAP is demographically and geographically diverse, with at least one member from each state, the District of Columbia, and Puerto Rico. The TAP is a Federal Advisory Committee to the IRS and it also serves as a focus group that makes recommendations to the IRS and the NTA. The TAP does not act on behalf of individual taxpayers and is limited to recommending changes that do not require legislative action. The TAS provides funding for the staff and research to support the TAP.⁸⁴ Taxpayers may submit their comments and suggestions for improving the IRS to the TAP online or by phone.

⁷⁸ I.R.C. § 7811(a)(1)(A).

⁷⁹ Treas. Reg. § 301.7811-1(a)(4)(ii).

⁸⁰ I.R.C. § 7811(a)(2).

⁸¹ Treas. Reg. § 301.7811-1(c).

⁸² Treas. Reg. § 301.7811-1(b).

⁸³ Internal Revenue Service “Taxpayer Advocacy Panel (TAP)” (13 April 2016) <<https://www.irs.gov/Advocate/Taxpayer-Advocacy-Panel>> (last accessed 7 November 2016).

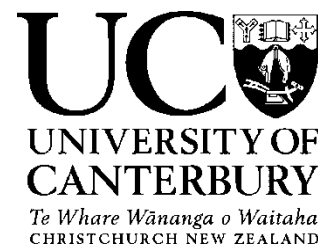
⁸⁴ IRM 13.1.1.3.6.1.

1.4.7 Low Income Taxpayer Clinics

Low Income Taxpayer Clinics (LITCs) serve individuals who have a problem with the IRS and whose income is below a certain level.⁸⁵ LITCs are independent from the IRS and the program is administered by the TAS. Most LITCs can provide representation before the IRS or in court on audits, tax collection disputes, and other issues for free or for a small fee. Some LITCs provide education for low income taxpayers and taxpayers who speak English as a second language about their taxpayer rights and responsibilities. While LITCs are not part of the IRS, they receive partial funding from the IRS via the LTC grant program. LTC grantees are generally legal aid or legal service organisations; clinics at law, business or accounting schools; and other not-for-profit organisations that provide services to the poor. Each clinic determines if prospective clients meet the income poverty guidelines and other criteria before it agrees to represent a client.

⁸⁵ Internal Revenue Service “Low Income Taxpayer Clinics” (4 May 2016) <<http://www.irs.gov/Advocate/Low-Income-Taxpayer-Clinics>> (last accessed 7 November 2016).

Appendix 2: Human Ethics Approval



HUMAN ETHICS COMMITTEE

Secretary, Lynda Griffioen
Email: human-ethics@canterbury.ac.nz

Ref: HEC 2014/161

15 December 2014

Melinda Jone
Department of Accounting & Information Systems
UNIVERSITY OF CANTERBURY

Dear Melinda

The Human Ethics Committee advises that your research proposal “Tax disputes system design: international comparisons and the development of guidance” has been considered and approved.

Please note that this approval is subject to the incorporation of the amendments you have provided in your email of 11 December 2014.

Best wishes for your project.

Yours sincerely

A handwritten signature in black ink, appearing to read 'L Macdonald', written over a light grey rectangular background.

Lindsey MacDonald
Chair
University of Canterbury Human Ethics Committee

Appendix 3: Information Sheets and Sample Letter

Appendix 3.1: Information Sheet for Alternative Dispute Resolution Participants

College of Business and Law

Melinda Jone
Department of Accounting and Information Systems
Telephone: +64 021 045 1059
Email: melinda.jone@pg.canterbury.ac.nz



1 April 2015

Tax Disputes System Design Information Sheet for Alternative Dispute Resolution (ADR) Participants

Dear Sir/Madam,

You are invited to participate in the research study: “Tax Disputes System Design”. This research is being conducted by Melinda Jone, for completion of a Doctoral Dissertation in the Department of Accounting and Information Systems at the University of Canterbury under the supervision of Professor Adrian Sawyer and Associate Professor Andrew Maples. This research has been reviewed and approved by the University of Canterbury’s Human Ethics Committee.

The objective of this study is to develop general guidance in tax dispute systems design (DSD) and to evaluate and subsequently adapt the general guidance in the context of the New Zealand tax disputes resolution procedures based on feedback obtained from selected stakeholders in New Zealand. DSD is aimed at reducing the costs of handling disputes and producing more satisfying and durable resolutions. DSD is thus important to a well-functioning tax disputes resolution system in New Zealand.

This research involves interviews with selected stakeholders in New Zealand. Accordingly, you have been selected to participate in an interview due to your specialist knowledge and/or experience with the tax disputes resolution procedures in New Zealand and/or with dispute resolution (including Alternative Dispute Resolution (ADR)). The interview is expected to last between 20-30 minutes. Attached to this information sheet are two additional information sheets (labelled “Dispute Systems Design” and “The New Zealand Tax Disputes Resolution Procedures”) and also a list of possible questions that you may be asked in the interview (labelled “Interview Questions”). It is important that you read all of these documents before participating in the interview. The reading of these documents should take you no longer than 15-20 minutes.

A digital voice recorder will be used to document the interviews, subject to your consent. You will be given the opportunity to review the interview transcript. Participation is voluntary and you have the right to withdraw at any stage up until the writing up of the thesis. If you withdraw, I will remove information relating to you up until the point of your withdrawal should this remain practically achievable.

The results of the project may be published, but you may be assured of the complete confidentiality of data gathered in this investigation. To ensure anonymity and confidentiality, your identity in any publications will be disguised. For example, participants will be referred to as “Inland Revenue Representative”, “Judicial Member 1”, “Tax Practitioner 1”, “ADR Practitioner 1”, “Tax Academic 1” or “ADR Academic 1” as applicable. The digital voice recordings and interview transcripts will be kept in locked and secure facilities and/or in password protected electronic form and will not be available to anyone other than the researcher and her supervisors. All information provided will be retained in secure storage for 10 years, after which it will be destroyed. However, a thesis is a public document and will be available through the UC Library. If you wish to receive a copy of the project results at the end of the research project, you can indicate this on the consent form attached.

Should you have any queries about your participation in this study, please do not hesitate to contact myself at melinda.jone@pg.canterbury.ac.nz or my supervisors: Professor Adrian Sawyer at adrian.sawyer@canterbury.ac.nz or Associate Professor Andrew Maples at andrew.maples@canterbury.ac.nz.

Any complaints about this project should be addressed to The Chair, Human Ethics Committee, University of Canterbury, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).

If you agree to participate in the study, you are asked to complete the attached consent form and return it by email to the researcher at melinda.jone@pg.canterbury.ac.nz.

Yours sincerely

M E Jone

Melinda Jone
Ph.D Candidate
Department of Accounting and Information Systems
University of Canterbury
Christchurch

A J Sawyer

Dr Adrian Sawyer
Professor of Taxation
Department of Accounting and Information Systems
University of Canterbury
Christchurch

A J Maples

Andrew Maples
Associate Professor of Taxation
Department of Accounting and Information Systems
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Christchurch

College of Business and Law

Melinda Jone
Department of Accounting and Information Systems
Telephone: +64 021 045 1059
Email: melinda.jone@pg.canterbury.ac.nz



1 April 2015

Tax Disputes System Design Information Sheet for Tax Participants/ Inland Revenue Representatives

Dear Sir/Madam,

You are invited to participate in the research study: “Tax Disputes System Design”. This research is being conducted by Melinda Jone, for completion of a Doctoral Dissertation in the Department of Accounting and Information Systems at the University of Canterbury under the supervision of Professor Adrian Sawyer and Associate Professor Andrew Maples. This research has been reviewed and approved by the University of Canterbury’s Human Ethics Committee.

The objective of this study is to develop general guidance in tax dispute systems design (DSD) and to evaluate and subsequently adapt the general guidance in the context of the New Zealand tax disputes resolution procedures based on feedback obtained from selected stakeholders in New Zealand. DSD is aimed at reducing the costs of handling disputes and producing more satisfying and durable resolutions. DSD is thus important to a well-functioning tax disputes resolution system in New Zealand.

This research involves interviews with selected stakeholders in New Zealand. Accordingly, you have been selected to participate in an interview due to your specialist knowledge and/or experience with the tax disputes resolution procedures in New Zealand and/or with dispute resolution (including Alternative Dispute Resolution (ADR)). The interview is expected to last between 20-30 minutes. Attached to this information sheet is an additional information sheet on DSD (labelled “Dispute Systems Design”) and also a list of possible questions that you may be asked in the interview (labelled “Interview Questions”). It is important that you read both of these documents before participating in the interview. The reading of these documents should take you no longer than 15-20 minutes.

A digital voice recorder will be used to document the interviews, subject to your consent. You will be given the opportunity to review the interview transcript. Participation is voluntary and you have the right to withdraw at any stage up until the writing up of the thesis. If you withdraw, I will remove information relating to you up until the point of your withdrawal should this remain practically achievable.

The results of the project may be published, but you may be assured of the complete confidentiality of data gathered in this investigation. To ensure anonymity and confidentiality, your identity in any publications will be disguised. For example, participants will be referred to as “Inland Revenue Representative”, “Judicial Member 1”, “Tax Practitioner 1”, “ADR Practitioner 1”, “Tax Academic 1” or “ADR Academic 1” as applicable. The digital voice recordings and interview transcripts will be kept in locked and secure facilities and/or in password protected electronic form and will not be available to anyone other than the researcher and her supervisors. All information provided will be retained in secure storage for 10 years, after which it will be destroyed. However, a thesis is a public document and will be available through the UC Library. If you wish to receive a copy of the project results at the end of the research project, you can indicate this on the consent form attached.

Should you have any queries about your participation in this study, please do not hesitate to contact myself at melinda.jone@pg.canterbury.ac.nz or my supervisors: Professor Adrian Sawyer at adrian.sawyer@canterbury.ac.nz or Associate Professor Andrew Maples at andrew.maples@canterbury.ac.nz. Any complaints about this project should be addressed to The Chair, Human Ethics Committee, University of Canterbury, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).

If you agree to participate in the study, you are asked to complete the attached consent form and return it by email to the researcher at melinda.jone@pg.canterbury.ac.nz.

Yours sincerely

M E Jone

Melinda Jone
Ph.D Candidate
Department of Accounting and Information Systems
University of Canterbury
Christchurch

A J Sawyer

Dr Adrian Sawyer
Professor of Taxation
Department of Accounting and Information Systems
University of Canterbury
Christchurch

A J Maples

Andrew Maples
Associate Professor of Taxation
Department of Accounting and Information Systems
University of Canterbury
Christchurch

Appendix 3.3: Sample Letter to Members of the Judiciary

College of Business and Law

Melinda Jone
Department of Accounting and Information Systems
Telephone: +64 021 045 1059
Email: melinda.jone@pg.canterbury.ac.nz



22 June 2015

[Participant's name]
[Participant's address details]

Tax Disputes System Design Interview

Dear [Participant's name],

My name is Melinda Jone and I am currently pursuing the Degree of Doctor of Philosophy in the Department of Accounting and Information Systems, at the University of Canterbury, Christchurch. As a requirement for the degree, I am conducting a study on "Tax Disputes System Design" under the supervision of Professor Adrian Sawyer and Associate Professor Andrew Maples. This research has been reviewed and approved by the University of Canterbury's Human Ethics Committee.

The objective of my study is to develop general guidance on tax disputes system design (tax DSD) and then subsequently adapt this guidance in the context of the New Zealand tax dispute resolution procedures. As part of this study I am seeking to interview selected stakeholders in New Zealand with knowledge on and/or experience with the tax disputes resolution procedures in New Zealand, on the tax DSD guidance developed.

Accordingly, as a member of the New Zealand judiciary with specialist knowledge on and experience with the tax disputes resolution procedures in New Zealand, I would like to invite you to participate in an interview. The interview will be conducted either face-to-face or by telephone and is expected to last up to 30 minutes. You will be provided with background information to the interview as well as the interview questions in advance of the interview.

If you would like to accept this offer of participating in an interview (or would like further details about participating in an interview), please email me at melinda.jone@pg.canterbury.ac.nz.

Yours sincerely

M E Jone

Melinda Jone
Ph.D Candidate
Department of Accounting and Information Systems
University of Canterbury
Christchurch

A J Sawyer

Dr Adrian Sawyer
Professor of Taxation
Department of Accounting and Information Systems
University of Canterbury
Christchurch

A J Maples

Andrew Maples
Associate Professor of Taxation
Department of Accounting and Information Systems
University of Canterbury
Christchurch

Appendix 3.4: Information Sheet for Members of the Judiciary

College of Business and Law

Melinda Jone
Department of Accounting and Information Systems
Telephone: +64 021 045 1059
Email: melinda.jone@pg.canterbury.ac.nz



22 June 2015

[Participant's name]
[Participant's address details]

Tax Disputes System Design Information Sheet for Members of the Judiciary

Dear [Participant's name],

You are invited to participate in the research study: "Tax Disputes System Design". This research is being conducted by Melinda Jone, for completion of a Doctoral Dissertation in the Department of Accounting and Information Systems at the University of Canterbury under the supervision of Professor Adrian Sawyer and Associate Professor Andrew Maples. This research has been reviewed and approved by the University of Canterbury's Human Ethics Committee.

The objective of this study is to develop general guidance in tax dispute systems design (DSD) and to evaluate and subsequently adapt the general guidance in the context of the New Zealand tax disputes resolution procedures based on feedback obtained from selected stakeholders in New Zealand. DSD is aimed at reducing the costs of handling disputes and producing more satisfying and durable resolutions. DSD is thus important to a well-functioning tax disputes resolution system in New Zealand.

This research involves interviews with selected stakeholders in New Zealand. Accordingly, you have been selected to participate in an interview due to your specialist knowledge and experience with the tax disputes resolution procedures in New Zealand. The interview is expected to last up to 30 minutes. Attached to this information sheet is an additional information sheet on DSD (labelled "Dispute Systems Design") and also the lists of the possible questions that you may be asked in the interview (labelled "Interview Questions" and "Additional Questions"). It is important that you read both of these documents before participating in the interview. The reading of these documents should take you no longer than 15-20 minutes.

A digital voice recorder will be used to document the interviews, subject to your consent. You will be given the opportunity to review the interview transcript. Participation is voluntary and you have the right to withdraw at any stage up until the writing up of the thesis. If you withdraw, I will remove information relating to you up until the point of your withdrawal should this remain practically achievable.

The results of the project may be published, but you may be assured of the complete confidentiality of data gathered in this investigation. To ensure anonymity and confidentiality, your identity in any publications will be disguised. For example, you may be referred to as "Judicial Member 1". The digital voice recordings and interview transcripts will be kept in locked and secure facilities and/or in password protected electronic form and will not be available to anyone other than the researcher and her supervisors. All information provided will be retained in secure storage for 10 years, after which it will be destroyed. However, a thesis is a public document and will be available through the UC Library. If you wish to receive a copy of the project results at the end of the research project, you can indicate this on the consent form attached.

Should you have any queries about your participation in this study, please do not hesitate to contact myself at melinda.jone@pg.canterbury.ac.nz or my supervisors: Professor Adrian Sawyer at adrian.sawyer@canterbury.ac.nz or Associate Professor Andrew Maples at andrew.maples@canterbury.ac.nz. Any complaints about this project should be addressed to The Chair, Human Ethics Committee, University of Canterbury, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).

If you agree to participate in the study, you are asked to complete the attached consent form and return it by email to the researcher at melinda.jone@pg.canterbury.ac.nz.

Yours sincerely

M E Jone

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Ph.D Candidate
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University of Canterbury
Christchurch

A J Maples

Andrew Maples
Associate Professor of Taxation
Department of Accounting and Information Systems
University of Canterbury
Christchurch

Appendix 4: Consent Forms

Appendix 4.1: Consent Form for Alternative Dispute Resolution Participants

College of Business and Law

Melinda Jone
Department of Accounting and Information Systems
Telephone: +64 021 045 1059
Email: melinda.jone@pg.canterbury.ac.nz



1 April 2015

Tax Disputes System Design Consent Form for Alternative Dispute Resolution (ADR) Participants

1. I have been given a full explanation of this project and have had the opportunity to ask questions.
2. I understand what is required of me if I agree to take part in the research.
3. I understand that participation is voluntary and I may withdraw at any time up until the writing up of the thesis. Withdrawal of participation will also include the withdrawal of any information I have provided should this remain practically achievable.
4. I understand that all interviews, whether face-to-face, by telephone, Skype or video conference, will be audio-taped unless I request otherwise.
5. I understand that I will be given the opportunity to review the interview transcript.
6. I understand that any information or opinions I provide will be kept confidential to the researcher and her supervisors and that any published or reported results will not identify the participants.
7. I understand that a thesis is a public document and will be available through the University of Canterbury Library.
8. I understand that all data collected for the study will be kept in locked and secure facilities and/or in password protected electronic form and will be destroyed after 10 years.
9. I understand that this project has been reviewed and approved by the Human Ethics Committee of the University of Canterbury.
10. I understand that I can contact the researcher: Melinda Jone at melinda.jone@pg.canterbury.ac.nz or her supervisors: Professor Adrian Sawyer at adrian.sawyer@canterbury.ac.nz and Associate Professor Andrew Maples at andrew.maples@canterbury.ac.nz for further information. If I have any complaints, I can contact the Chair of the University of Canterbury Human Ethics Committee, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).
11. By signing below, I agree to participate in this research project.

.....
(Name of participant)

(Signature of participant)

(Date)

☐ Please tick if you would like to receive a copy of the research results at the end of the project.

Please return the completed consent form by email to the researcher at melinda.jone@pg.canterbury.ac.nz.

Yours sincerely

M E Jone

Melinda Jone
Ph.D Candidate
Department of Accounting and Information Systems
University of Canterbury
Christchurch

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College of Business and Law

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1 April 2015

Tax Disputes System Design Consent Form for Tax Participants/ Inland Revenue Representatives

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2. I understand what is required of me if I agree to take part in the research.
3. I understand that participation is voluntary and I may withdraw at any time up until the writing up of the thesis. Withdrawal of participation will also include the withdrawal of any information I have provided should this remain practically achievable.
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7. I understand that a thesis is a public document and will be available through the University of Canterbury Library.
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9. I understand that this project has been reviewed and approved by the Human Ethics Committee of the University of Canterbury.
10. I understand that I can contact the researcher: Melinda Jone at melinda.jone@pg.canterbury.ac.nz or her supervisors: Professor Adrian Sawyer at adrian.sawyer@canterbury.ac.nz and Associate Professor Andrew Maples at andrew.maples@canterbury.ac.nz for further information. If I have any complaints, I can contact the Chair of the University of Canterbury Human Ethics Committee, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).
11. By signing below, I agree to participate in this research project.

.....
(Name of participant)

.....
(Signature of participant)

.....
(Date)

☐ Please tick if you would like to receive a copy of the research results at the end of the project.

Please return the completed consent form by email to the researcher at melinda.jone@pg.canterbury.ac.nz.

Yours sincerely

M E Jone

Melinda Jone
Ph.D Candidate
Department of Accounting and Information Systems
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Department of Accounting and Information Systems
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A J Maples

Andrew Maples
Associate Professor of Taxation
Department of Accounting and Information Systems
University of Canterbury
Christchurch

Appendix 4.3: Consent Form for Members of the Judiciary

College of Business and Law

Melinda Jone
Department of Accounting and Information Systems
Telephone: +64 021 045 1059
Email: melinda.jone@pg.canterbury.ac.nz



22 June 2015

[Participant's name]

[Participant's address details]

Tax Disputes System Design Consent Form for Members of the Judiciary

1. I have been given a full explanation of this project and have had the opportunity to ask questions.
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3. I understand that participation is voluntary and I may withdraw at any time up until the writing up of the thesis. Withdrawal of participation will also include the withdrawal of any information I have provided should this remain practically achievable.
4. I understand that all interviews, whether face-to-face, by telephone, Skype or video conference, will be audio-taped unless I request otherwise.
5. I understand that I will be given the opportunity to review the interview transcript.
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9. I understand that this project has been reviewed and approved by the Human Ethics Committee of the University of Canterbury.
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11. By signing below, I agree to participate in this research project.

.....
(Name of participant)

.....
(Signature of participant)

.....
(Date)

☐ Please tick if you would like to receive a copy of the research results at the end of the project.

Please return the completed consent form by email to the researcher at melinda.jone@pg.canterbury.ac.nz.

Yours sincerely

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University of Canterbury
Christchurch

A J Maples

Andrew Maples
Associate Professor of Taxation
Department of Accounting and Information Systems
University of Canterbury
Christchurch

Appendix 5: Supplementary Information Sheet for Interview Participants

Dispute Systems Design

Dispute Systems Design (DSD) refers to a deliberate effort to identify and improve the way an organisation addresses conflict by decisively and strategically arranging its dispute resolution processes. The concept of DSD originated in the context of workplace conflict. Within this context, a number of general DSD principles have been formulated by various practitioners in the DSD field. However, to date, to the researcher's knowledge, there have been no DSD principles developed for use in the context of the design of tax dispute resolution systems.

Table 1 contains a set of **general tax DSD principles derived by the researcher based on the general DSD principles in the DSD literature**. It is intended that the tax DSD principles derived can be adapted by tax administrations around the world and used in either developing or improving their tax disputes resolution procedures. This study is set against the background of the increasing use of Alternative Dispute Resolution (ADR) processes by revenue authorities around the world in resolving tax disputes.

This interview will seek your feedback on the researcher's general tax DSD principles contained overleaf in Table 1:

- (i) In the **context of tax dispute resolution generally**; and
- (ii) on how they may be adapted in the **context of the New Zealand tax disputes resolution system**.

Please note the following dispute resolution terms:

- **Alternative Dispute Resolution (ADR):** an umbrella term for processes, other than judicial or tribunal determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR processes can generally be classified as facilitative, advisory or determinative:
 - In **facilitative processes**, an ADR practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole of the dispute (for example, facilitation and mediation).
 - In **advisory processes**, an ADR practitioner considers and appraises the dispute and provides advice on some or all of the facts of the dispute, the law, and possible or desirable outcomes (for example, neutral evaluation).
 - In **determinative processes**, an ADR practitioner evaluates the dispute and makes a determination (for example, arbitration).
- **Interests-based approaches:** focus upon the underlying interests of the parties with the aim of producing solutions which satisfy as many of those interests as possible (for example, facilitation and mediation).
- **Rights-based approaches:** determine who is 'right' according to an independent and objective standard such as precedent, socially accepted behavioural standards or legal benchmarks (for example, arbitration and litigation).
- **Power-based approaches:** characterised by the use of power (the ability to coerce someone into something they would not ordinarily do) and frequently involve the exchange of threats and/or acts of aggression (for example, the unilateral imposition of a management decision, strikes and warfare)

Table 1: The General Tax DSD Principles

(1)	Stakeholders are included in the design process. For example, stakeholders may be involved in pilot ADR programs and in reviews and consultations on the tax dispute resolution system.
(2)	The system has multiple options for addressing conflict including interests, rights and power-based processes. For example, the system's options for addressing conflict may include: direct negotiation, internal review and litigation as well as interests and rights-based ADR options. In addition, interests and rights-based ADR options should also be available at the audit and litigation stages.
(3)	The system provides for loops backward and forward. Loop-back mechanisms allow parties to return from rights and power-based options back to interests-based options and loop-forward mechanisms allow parties to move directly to a rights-based option without having to go through all of the earlier interests-based options. For example, ADR options available at the litigation stage can provide loop-back mechanisms and the ability for taxpayers to by-pass the revenue authority's internal review process can provide a loop-forward mechanism.
(4)	There is notification before and feedback after the resolution process. Notification in advance of taking a proposed action affecting others can prevent disputes that arise through misunderstanding or miscommunication and can identify points of difference early on so that they may be negotiated. Post-dispute analysis and feedback can help parties to learn from disputes in order to prevent similar disputes in the future. For example, in order to prevent disputes from arising, general notification of potential areas for disputes can be provided through the revenue authority's compliance activities and campaigns, and through the publication of case notes on court decisions. To prevent similar disputes in the future, feedback on disputes can be provided through the publication of general statistics on dispute matters and through post-dispute analysis and publication of feedback collected from participants in revenue authority ADR programs.
(5)	The system has an internal person or unit that functions as a mentor and advisor for revenue authority staff. Revenue authority staff should have access to an internal person or unit to which they can go to for mentoring and advice on ADR techniques.
(6)	Procedures are ordered from low to high cost. The steps in the formal disputes procedures should be arranged in a low to high cost sequence (notwithstanding that high upfront costs are generally likely to be incurred by taxpayers involved in tax disputes). The use of additional ADR options can also add additional costs at the stage of the formal disputes procedures at which they are utilised. However, if the dispute is resolved at this stage, then parties do not have to subsequently move further up the sequence to higher cost processes.
(7)	The system has multiple access points. The system should allow taxpayers to enter the system through many access points, structurally. For example, entry at the level of internal review or entry at the level of external appeal. There should also be a range of methods to deliver notification of entry to the dispute resolution system. For example, by personal delivery, electronic means of communication or post. In addition, multiple forms of access to the system should be provided through the provision of forms and guides in different languages and in alternative formats, and a choice of access persons should be available for certain taxpayers to approach (including non-English speaking taxpayers and deaf, hearing-impaired or speech impaired taxpayers).

(8)	The system includes training and education for stakeholders. For example, the general in-house training of revenue authority staff should include a specific component on conflict management and resolution. Revenue authority staff acting as facilitators or mediators should receive specialised training in mediation developed by external ADR specialists. Education about the dispute system can be provided through information about the disputes resolution procedures provided on the revenue authority's website, the publication of guides on the disputes resolution procedures, revenue authority guidelines on the disputes procedures and online learning material for tax agents.
(9)	Assistance is offered for choosing the best process. For example, revenue authority guidelines on the disputes resolution procedures in order to assist in the appropriate use of processes, and the existence of a unit within the revenue authority responsible for overseeing (and providing advice on) the ADR programs available. In addition, requests for ADR should be approved by relevant staff from the above unit.
(10)	Taxpayers have the right to choose a preferred process. Choice of a preferred process may be offered in a number of ways including (but not limited to): taxpayers can choose to have an internal review, appeal externally or do both; the choice for taxpayers to use ADR is made available alongside their existing review and appeal rights; taxpayers can choose to use ADR (if it is appropriate) once a dispute reaches a tribunal or court; and qualifying taxpayers can choose to have matters dealt with in a tribunal or court using small tax case procedures.
(11)	The system is fair and perceived as fair. The disputes resolution system as a whole should be fair and perceived as fair. For example, the internal review function of the revenue authority should be independent from the audit or compliance function. In addition, revenue authority staff acting as facilitators or mediators in ADR programs of the revenue authority should be fair and perceived as fair. For example, revenue authority facilitators or mediators should have had no prior involvement in the particular dispute.
(12)	The system is supported by senior revenue authority members. There should be visible evidence of sincere championship of the disputes resolution system and of ADR by senior revenue authority members. For example, through speeches, presentations, media statements or other releases.
(13)	The system is aligned with the mission, vision and values of the organisation. For example, the disputes resolution system should be integrated into the organisation through the revenue authority's taxpayers' charter (or equivalent), and the revenue authority's approach towards dispute resolution, outlined in its Disputes Policy (or equivalent), should be aligned with its overall mission, vision and values. In addition, the revenue authority's future plans with respect to dispute resolution should feature in its Strategic Plan (or equivalent).
(14)	There is evaluation of the system. For example, evaluation of the tax dispute resolution system can occur through regular or one-off surveys on the system conducted for the revenue authority by external agencies; evaluation can be provided by submissions, reviews and reports from government-appointed entities, parliamentary committees and other external stakeholders; taxpayers can provide general feedback on the system (for evaluation) to the revenue authority, for example, through completing online forms and participants in ADR programs can be invited to provide feedback (for evaluation) at the conclusion of the ADR process.

The New Zealand Tax Disputes Resolution Procedures¹

Tax disputes in New Zealand typically arise when a taxpayer and Inland Revenue have not reached agreement on an issue following an Inland Revenue investigation or audit. The disputes procedure involves a number of statutorily prescribed and administrative steps as set out in Figure 1. The steps in the dispute resolution process generally include the following:

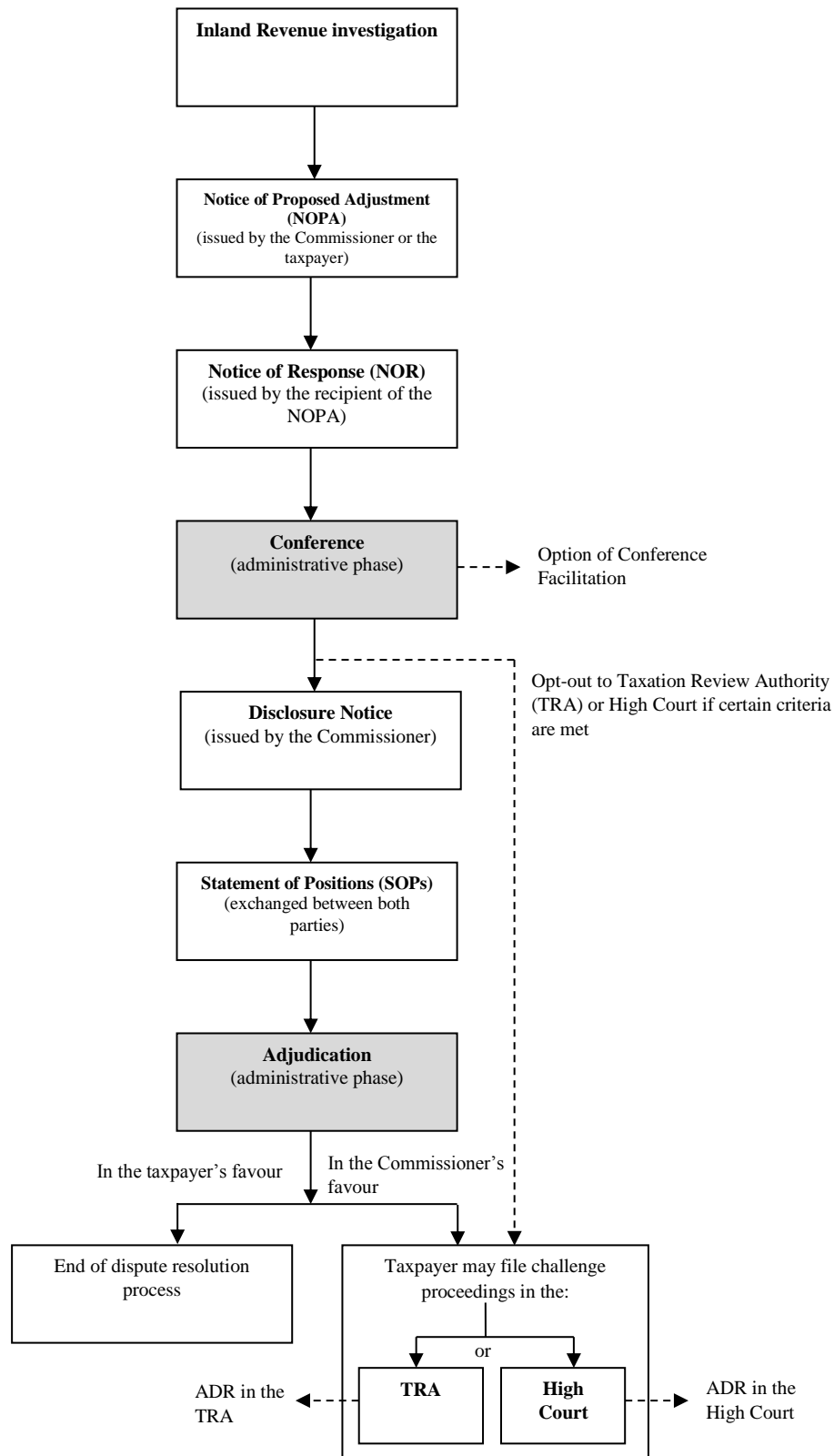
- Either the Commissioner of Inland Revenue (the Commissioner) or the taxpayer issues a Notice of Proposed Adjustment (NOPA).
- The responding party will issue a Notice of Response (NOR).
- If the NOR is not accepted in full, a conference is held to discuss outstanding issues (an administrative step).
- If issues are still not resolved, a Disclosure Notice is issued by the Commissioner.
- A Statement of Position (SOP) is then issued by each party.
- Matters are then referred to Inland Revenue's Disputes Review Unit for adjudication (an administrative step).
- If the Disputes Review Unit decides the issue in favour of the taxpayer, that is the end of the dispute. If the decision is in favour of the Commissioner, then the taxpayer can refer the matter to the Taxation Review Authority (TRA) or the High Court.

As indicated in Figure 1, after the conference phase, in certain (limited) circumstances, taxpayers can request to opt out of the disputes process after the conference phase if certain criteria are met.

ADR features in the New Zealand tax dispute resolution procedures through the availability of conference facilitation (as an option in the conference phase). The conference facilitator is a senior Inland Revenue member of staff who has not previously been involved in the dispute. ADR is also potentially available in the TRA and the High Court (for example, judicial settlement conferences, mediation or other form of ADR agreed to by the parties).

¹ This section of the supplementary information sheet, describing the New Zealand tax dispute resolution procedures, was provided to the ADR participants only.

Figure 1: The New Zealand Tax Dispute Resolution Procedures



Appendix 6: Interview Guide

Interview Questions

Questions in the context of tax dispute resolution generally:

1. Which of the tax DSD principles do you think is/are the most important? Why? Which of the tax DSD principles do you think is/are the least important? Why? Please rank the 14 DSD principles in order of importance (from highest to lowest).
2. Are there any tax DSD principles which require modification? If so, how should they be modified? Why should they be modified?
3. Are there any additional tax DSD principles that you think should be added? If so, what are they? Why should they be added?
4. Are there any tax DSD principles that you think should be deleted? If so, which one(s)? Why should they be deleted?

Questions in the context of the New Zealand tax dispute resolution procedures:

5. Are there any changes that you would make to your ranking of the 14 DSD principles (in Question 1) in the context of the New Zealand tax dispute resolution procedures? If so, please explain them.
6. Are there any further changes (modifications/additions/deletions) to the tax DSD principles that should be made in the context of the New Zealand tax dispute resolution procedures? If so, please describe them.
7. Do you think that there are any issues in applying the tax DSD principles to the existing New Zealand tax disputes resolution procedures? If so, please describe them.

General questions:

8. Linking back to the example provided in DSD principle 7 of the provision of forms and guides in different languages, do you think that the dispute resolution system should recognise the different ethnic backgrounds of taxpayers? If not, why? If so, how? How would this apply in the New Zealand context?
9. Do you have any general comments?

Appendix 7: Sample Notices and Emails to Practitioner and Academic Participants

Appendix 7.1: Sample New Zealand Law Society (NZLS) Notice

Invitation to Participate in Research on Tax Disputes System Design

Melinda Jone, a PhD student at the University of Canterbury, is currently undertaking research on the topic of tax disputes system design. As part of this research, she is looking to interview practitioners with experience of the New Zealand tax disputes resolution procedures. She is seeking feedback on dispute systems design principles in both the general context of tax dispute resolution as well as the specific context of tax dispute resolution in New Zealand. Lawyers who are willing to be interviewed should contact Melinda Jone at melinda.jone@pg.canterbury.ac.nz.

Appendix 7.2: Sample Arbitrators' and Mediators' Institute of New Zealand (AMINZ) Notice

Invitation for Participation in Research on Tax Dispute Systems Design

Melinda Jone is pursuing the Degree of Doctor of Philosophy in the Department of Accounting and Information Systems, at the University of Canterbury, Christchurch. As a requirement for the degree she is conducting a study on "Tax Dispute Systems Design" under the supervision of Professor Adrian Sawyer and Associate Professor Andrew Maples. This research has been reviewed and approved by the University of Canterbury's Human Ethics Committee.

The objective of her study is to develop general guidance on tax dispute systems design (tax DSD) and then subsequently adapt this guidance in the context of the New Zealand tax dispute resolution procedures. As part of the study Melinda is seeking to interview accredited ADR practitioners in New Zealand on the tax DSD guidance developed. Some knowledge/experience in DSD is preferable (but not a requirement). If you would like to participate in an interview (or would like further details about participating in an interview), please email: melinda.jone@pg.canterbury.ac.nz.

Appendix 7.3: Sample Association of Dispute Resolvers and Institute of Arbitrators and Mediators Australia (LEADR & IAMA) Notice

Invitation for Participation in Tax Disputes Systems Design Research

Melinda Jone, a PhD student at the University of Canterbury, is currently undertaking research on tax disputes system design. As part of this research, she is looking to interview accredited ADR practitioners in New Zealand, on the application of tax dispute system design principles in tax dispute resolution. Accredited ADR practitioners in New Zealand who are willing to participate in an interview can contact Melinda Jone at melinda.jone@pg.canterbury.ac.nz.

Appendix 7.4: Sample Email Sent to Additional Practitioners and Academics Identified by the Researcher

Dear [participant's name],

I am a postgraduate student at the University of Canterbury currently undertaking a PhD on the topic of tax disputes system design (tax DSD). As part of my research I am conducting some interviews with various stakeholders in the areas of DSD, dispute resolution (including ADR) and tax disputes resolution. The objective of the interviews is to seek feedback on a set of tax DSD principles which I have derived, both in the context of tax disputes resolution generally as well as in the context of the NZ tax dispute resolution procedures. I was therefore, wondering whether you would be interested in participating in a short (telephone) interview due to your knowledge on [tax] dispute resolution? I would very much value your feedback.

If you are interested, I will provide you with some background reading material on the topic (including the interview questions) which will need to be read in advance of the interview. The reading of this material should take approximately you 15-20 minutes.

Please let me know if you are interested. I look forward to hearing from you in the near future.

Yours sincerely

Melinda Jone

Appendix 8: Additional Interview Questions for Inland Revenue Representatives

Additional Questions

1. What are the ways in which Inland Revenue seeks to achieve stakeholder (e.g. taxpayers, tax agents, Inland Revenue staff) 'buy-in' into the disputes resolution procedures? If so, how?
2. Is the NZ dispute resolution system supported/ 'championed' by the Commissioner of Inland Revenue and senior Inland Revenue staff? If so, in what way(s)? How important would you regard this support/ championship? Could it be improved?
3. What is your understanding with respect to stakeholders' perceptions of current Inland Revenue facilitated conferences? Do you think the current conference facilitation process could be improved? If so, how?
4. What is your view on engaging independent external mediators instead of Inland Revenue staff as facilitators?
5. Do you think that additional alternative dispute resolution (ADR) processes should be incorporated within the tax dispute resolution procedures? Why/ why not? If so, please explain them.
6. What advice would you give to taxpayers (and their agents) in dealing with a dispute with Inland Revenue?
7. Do you think that the current tax dispute resolution procedures are achieving the original objectives for the dispute resolution system put forward by the Richardson Committee in 1994? Do you think that the current system is efficient and effective in terms of time and cost? Could this be improved? If so, how?

Appendix 9: Additional Interview Questions for Members of the Judiciary

Additional Questions¹

1. Do you think taxpayers should be given more choice in the current New Zealand tax dispute resolution procedures with respect to being able to choose between particular dispute resolution processes/ methods to resolve their dispute? Why/ why not? If so, how?
2. Do you think that the current tax dispute resolution procedures are achieving the original objectives for the dispute resolution system put forward by the Richardson Committee in 1994 (to “prevent unnecessary disputes arising; and resolve those disputes that do occur fairly and expeditiously, and in accordance with the law”)? Do you think that the current system is efficient and effective in terms of time and cost? Could this be improved? If so, how?
3. Would you make any modifications and/or additions to the DSD principles to provide for small taxpayers in the tax dispute resolution system? Why/ why not? If so, what changes would you make?
4. Do you think that additional alternative dispute resolution (ADR) processes (to the existing conference facilitation process) should be incorporated within the tax dispute resolution procedures? Why/ why not? If so, please explain them.
5. Do you think that facilitators (or mediators) involved in the tax dispute resolution procedures should be firstly be trained and skilled in dispute resolution/ mediation or firstly be an expert in tax? Please explain.
6. Do you think that facilitators (or mediators) involved in the tax dispute resolution procedures should be Inland Revenue members of staff or external independent mediators? Please explain.
7. What are your views on providing the option for taxpayers to engage an external independent mediator to facilitate/mediate **jointly** with Inland Revenue facilitators in Inland Revenue facilitated conferences?
8. What are you views on Inland Revenue’s culture or mindset towards dispute resolution? Could this be improved? If so, how?

¹ Not all of the interview questions were answered by the members of the judiciary due to the more restricted extent of their knowledge and experience with the current New Zealand tax dispute resolution system.